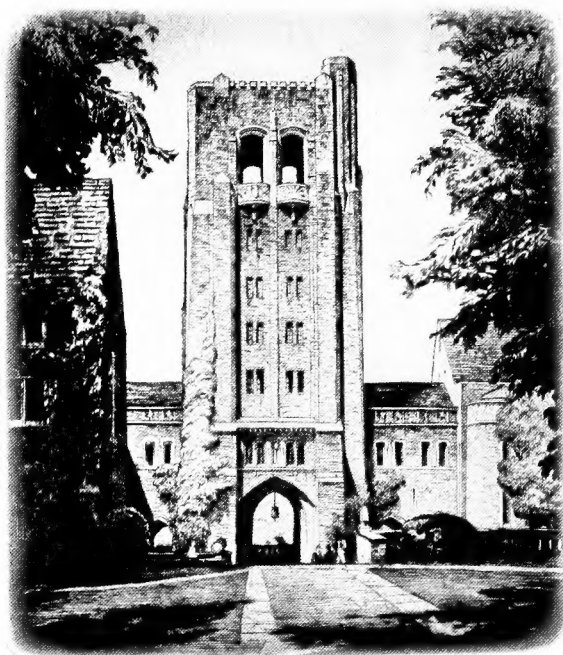




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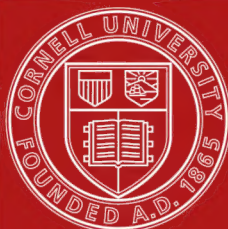
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THE PRACTICE
IN
CIVIL ACTIONS

IN THE
COURTS OF RECORD
OF THE STATE OF NEW YORK
UNDER THE CODE OF CIVIL
PROCEDURE

BY WILLIAM RUMSEY
JUSTICE OF THE SUPREME COURT

SECOND EDITION, REVISED AND EDITED BY
WILLIAM RUMSEY AND JOHN S. SHEPPARD, JR.
OF THE NEW YORK BAR

VOLUME I.

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PREFACE TO SECOND EDITION.

It is now fifteen years since the first volume of the first edition of this treatise appeared. During this time I think the author's wish, expressed in the preface to the first edition, that the book might lighten the labors of the profession, has been amply gratified. Indeed, this new edition is the result of many requests to the author and publisher that the book should be made to conform to present conditions.

I should have been reluctant to undertake the task if the author had not assured me the benefit of his advice and help, and I have, accordingly, turned to him when the path was not plain. I hope I have been able to incorporate in the work a part, at least, of his wealth of experience and suggestion.

I have adhered to the plan of the original treatise as closely as possible. The number of citations has been increased, but I trust not out of proportion to the mass of decisions; the effort has been to cite no more cases than were necessary to make the discussion of subjects comprehensive and authoritative. Despite such endeavor, this edition is materially larger than the first. The tendency of recent legal works seems to be, however, toward increasing bulk, and I fancy their authors and editors have found themselves as unable to withstand the flood of decisions as I have in this instance. If my inability in this respect has not rendered the book too cumbersome for convenient reference, the increase may not be disadvantageous.

My wish and endeavor have been simply to bring Judge Rumsey's work up to date. If I have been in any degree successful, I shall deem well-spent the many hours of labor.

There are many indications of the author's assistance in the preparation of this second edition, but the task never could have been accomplished without the unfailing inspiration and help of his daughter—my wife.

New York,

1902.

J. S. S. JR.

PREFACE TO FIRST EDITION.

Sir Henry Maine has said, in his book on Ancient Law, that it is the theory of the common law that every case which arises for judgment is decided by some rule which already exists; and yet, the moment the judgment is made, we admit that it has to some extent modified the law. Very much the same thing may be said of the code of civil procedure. Nominally, it was, so far as the two coincided, a revision of the code of procedure, with such changes only as made that code conform to the construction which had been given to it by the courts. Practically, there is no doubt that it affected many and great changes in the law of procedure. It resulted from this change that the books on practice, in use when the code of civil procedure was adopted, are almost obsolete and of little assistance to the profession. There is now no complete work on practice under the code of civil procedure, and the want of such a work is very generally felt. To supply that want is the object of this book. In attempting to do so, I have not felt it to be my duty to say what the law ought to be, but only, so far as it could be gathered from the decided cases, to state what the courts had said that it was. An effort has been made to state fully, clearly, succinctly and with accuracy, what the courts had decided upon that portion of the law of procedure contained in this book, at the time it was written. If that has been done, my aim has been accomplished. I hope that it may be a substantial help to my brethren of the profession; may lighten their labor, the weight of which I know; and may tend to settle the law

of practice. If I have succeeded in doing these things I shall be satisfied.

In the arrangement of topics, the code of civil procedure has been followed as closely as was consistent with convenience. Only such departures have been made from the arrangement adopted in that statute, as would enable the practitioner to follow, step by step in the book, the usual proceedings of a law suit, in the order in which they were most likely to occur.

Every effort has been made, consistent with accuracy, to make the book as brief as possible. To this end, while all the cases in this state have been examined, by no means all have been cited. If a principle had been decided by the court of appeals, it was not thought necessary to cite decisions of subordinate courts to establish the same thing, and such decisions have not been cited, except in a few cases where they explained the case decided by the higher court. If a principle has not been disputed, one or two leading cases were thought to establish it sufficiently. If any principle had been decided by special terms only, several cases have been cited to it if they exist, especially where they were decided by different courts. Where, after dispute, a principle seems to be laid down finally, the case thus deciding it has been cited, the fact of dispute being stated or not, according to the importance of the question. No attempt has been made to cite the decisions of inferior courts of limited jurisdiction; neither has it been thought necessary to cite many cases from the reports of other states; a well considered *dictum* by a court of this state being regarded as of equal authority here with a decision of a court of some other jurisdiction. By adhering to these rules, the number of citations has been considerably diminished. Yet over three thousand cases have been cited in this one volume, and it is believed that the practitioner will find ample authority in the volume for the propositions stated in it. It has been decided to omit any forms, although that course is a departure from the usual custom. But there are so recent, and so good books of forms, that I thought the

space which would be taken up by them in this work might be more usefully filled.

In some cases recent decisions, made after the book was printed, have changed the rule laid down in it. As an instance of this may be cited the case of *Smith v. Laird* (44 Hun, 530), which holds that the defendant cannot, on amending as of course, substitute an answer for a demurrer, and thus overrules the case of *Carpenter v. Adams* (34 Hun. 429), cited to the contrary proposition on page 282. But such cases are few, and, in several of them, as in the one cited, I venture to suggest that the old rule may be the correct one.

The sections of the code have been cited at length, because where it speaks, the code is the rule, and it was thought safer to use the precise words, than to run the risk of misleading by an attempt to paraphrase them. One or two of the sections have been printed more than once, where they refer to matters which were treated of in different parts of the book. This was done, although it involved a repetition, to avoid confusion, or a clumsy reference from one place to another.

The work will be completed in two more volumes. The second will complete the account of the progress of a civil action, and the third will treat of special actions, and will contain a complete index of the whole work.

I have been much assisted in the preparation of the work by H. A. Corell, Esq., who prepared the chapters on the complaint, on arrest and bail, and on receivers, and the table of cases.

W. R.

BATH, Nov., 1887.

TABLE OF CONTENTS.

CHAPTER I.

THE COURTS OF THE STATE OF NEW YORK.

	PAGE.
ARTICLE I. The Courts, their Judges and Officers.....	1
Sec. 1. The Rules, and how made.....	1
2. The Courts of Record.....	3
3. When and how open.....	4
4. The Terms of the Courts, and their Appointment.....	6
The Court of Appeals.....	6
The Supreme Court.....	7
The City Court of the City of New York.....	10
The County Courts.....	10
The Court of Claims.....	11
Adjournments	11
5. Judges	12
6. The Clerks of the Courts.....	16
7. Sheriffs	20
8. Coroners	26
9. Elisors	29
10. Attorneys and Counselors.....	29
ARTICLE II. The Jurisdiction of the Courts.....	55
Sec. 1. Their Jurisdiction generally.....	55
2. The Court of Appeals.....	60
3. The Supreme Court.....	63
4. Courts which have been abolished.....	68
5. The City Court of the City of New York.....	68
6. The County Courts.....	71
7. Power of Judges out of Court.....	77

CHAPTER II.

ACTIONS AND THE TIME OF COMMENCING THEM.

ARTICLE I. Of Actions.....	80
ARTICLE II. The Limitation of Actions.....	82
Sec. 1. Actions for the Recovery of Real Property.....	82

	PAGE.
Sec. 2. Actions other than for the Recovery of Real Property..	90
Subd. 1. Within twenty Years.....	90
Subd. 2. Within six Years.....	93
Subd. 3. Within five Years.....	97
Subd. 4. Within three Years.....	97
Subd. 5. Within two Years.....	99
Subd. 6. Within one Year.....	100
Subd. 7. Within ten Years.....	101
Subd. 8. Actions by the People.....	102
3. Non-residence, or Absence from the State.....	103
4. What Prevents the Running of the Statute.....	105
5. What Actions are not Within the Statute.....	111
6. Mode of Computing Time.....	111
7. Defense and Counterclaim.....	114
8. What takes a Case out of the Statute.....	114
9. How Objections taken.....	117
10. Cases not within the General Statute.....	118
11. When Action deemed begun.....	118

CHAPTER III.

LEAVE TO SUE.

ARTICLE I. Judgments.....	121
ARTICLE II. Mortgages.....	123
ARTICLE III. Official bonds.....	125
ARTICLE IV. Actions to Dissolve a Corporation.....	128
ARTICLE V. Actions by and against Receivers.....	130
Sec. 1. Actions by Receivers.....	130
2. Actions against Receivers.....	131
ARTICLE VI. Actions by or against the Committee of Incompetent Person	132
ARTICLE VII. Partition by an Infant.....	133
ARTICLE VIII. Leave to sue as a Poor Person.....	134

CHAPTER IV.

THE PARTIES TO AN ACTION.

ARTICLE I. General Rules as to Parties.....	139
ARTICLE II. Agents and Principals.....	143
ARTICLE III. Assignees.....	144
ARTICLE IV. Unincorporated Associations.....	145
ARTICLE V. Corporations, Directors and Stockholders.....	147
ARTICLE VI. Estates of Deceased Persons.....	149
ARTICLE VII. Public Officers.....	152
ARTICLE VIII. Trustees of an Express Trust.....	157
ARTICLE IX. Where one may sue or be sued for all.....	159
ARTICLE X. Joint and Several Parties.....	161
ARTICLE XI. Proceedings against Defendants Severally Liable....	164

	PAGE.
ARTICLE XII. Parties in Actions respecting Real Estate.....	166
Sec. 1. Actions of Ejectment.....	166
2. Actions for Partition.....	170
3. Actions for Dower.....	174
4. Actions to foreclose Mortgage.....	175
5. Actions to compel Determination of Claim to Real Property	178
6. Actions for Waste.....	179
7. Actions for Nuisance.....	180
ARTICLE XIII. Where the Defendant or his Name is unknown....	181
ARTICLE XIV. Infant Plaintiffs and Defendants.....	182

CHAPTER V.

COMMENCEMENT OF THE ACTION.

ARTICLE I. The Summons.....	189
Sec. 1. When Jurisdiction is acquired.....	189
2. Contents of the Summons.....	190
3. Service of Complaint, or Notice, with the Summons....	193
Subd. 1. Actions on Contract.....	193
Subd. 2. Actions for a Penalty and Forfeiture.....	195
Subd. 3. Notice of no Personal Claim.....	197
ARTICLE II. Personal Service of the Summons.....	197
Sec. 1. By whom made.....	197
2. How made upon a Natural Person.....	198
Subds. 1, 2. Upon an Infant or Incompetent Person..	198
Subd. 3. On the Sheriff.....	199
Subd. 4. On other Persons.....	200
3. Service on a Domestic Corporation.....	205
4. On a Foreign Corporation.....	207
5. Service of Process to commence Special Proceedings....	211
6. Proof of Personal Service.....	211
Subd. 1. Sheriff's Certificate of Service.....	211
Subd. 2. Affidavits of service.....	212
Subd. 3. Admission of service.....	213
ARTICLE III. Service other than Personal.....	214
Sec. 1. Substituted Service	214
2. Service by Publication.....	217
Subd. 1. When it may be made.....	217
Subd. 2. What must be shown to obtain the Order....	219
Subd. 3. Order, by whom made and what to contain..	223
Subd. 4. Filing papers, Notice.....	225
Subd. 5. Publication and Service.....	227
Subd. 6. Proof of Service.....	228
Subd. 7. When Defendant allowed to defend	228
ARTICLE IV. General Appearance.....	230
Sec. 1. How and when made.....	230
2. Effect of General Appearance.....	231

	PAGE.
Sec. 3. When the Defendant may appear.....	234
4. When the Defendant must answer.....	235

CHAPTER VI.

NOTICE OF PENDENCY OF ACTION.

ARTICLE 1. When to be filed by Plaintiff.....	237
ARTICLE II. Contents of the Notice.....	240
ARTICLE III. Recording	240
ARTICLE IV. When filed by the Defendant.....	240
ARTICLE V. Effect of Notice.....	241
ARTICLE VI. Amendments and Cancellation.....	242
Sec. 1. Amendment	242
2. Cancellation	243

CHAPTER VII.

MOTIONS AND ORDERS.

ARTICLE I. Motions.....	245
Sec. 1. Motions defined.....	245
2. When and where made.....	246
3. Motion Papers, how prepared.....	250
ARTICLE II. Affidavits and Petitions.....	252
Sec. 1. Form and Contents of Affidavit.....	252
2. Special Requirements in certain Affidavits.....	256
3. Before whom Affidavits may be taken.....	258
Subd. 1. Within the State.....	258
Subd. 2. Without the State to be used within it....	259
4. Petitions	260
5. Depositions to be used on Motion.....	260
6. Opposing Affidavits	263
7. Replying Affidavits	263
ARTICLE III. Notice of Motion.....	263
ARTICLE IV. Orders to show cause.....	265
ARTICLE V. Stay of Proceedings.....	266
ARTICLE VI. Practice after the Notice.....	268
Sec. 1. Countermanding	268
2. Hearing	269
3. New Proofs	269
4. Default	270
5. Re-hearing	271
Subd. 1. Renewal of Contested Motions.....	271
Subd. 2. Renewal of <i>ex parte</i> Applications.....	272
6. Re-argument	273
ARTICLE VII. Orders.....	274
Sec. 1. What are Orders.....	274
2. How Drawn	274
3. Form and Contents.....	275
4. Filing and Entering.....	277

	PAGE.
Sec. 5. When the Order takes Effect.....	278
6. Notice of Entry and Service.....	279
7. Conditions	279
8. Vacating and Modifying.....	280
ARTICLE VIII. Costs of Motion.....	281

CHAPTER VIII.

MISCELLANEOUS PRACTICE REGULATIONS.

ARTICLE I. Notices and Papers.....	283
ARTICLE II. Service and Filing of Papers.....	285
Sec. 1. On whom Service to be made.....	285
2. Mode of Service.....	286
3. Proof of Service.....	289
4. Filing Papers	290
ARTICLE III. Regulations respecting Time.....	292
Sec. 1. When Service must be made.....	292
2. How Time computed.....	292
3. Extension of Time.....	294
ARTICLE IV. Bonds and Undertakings.....	297
ARTICLE V. Consolidation of Actions.....	304
ARTICLE VI. Interpleader.....	308
ARTICLE VII. Dismissal for Neglect to Proceed.....	314
Sec. 1. For Failure to serve the Summons.....	314
2. For unreasonable Neglect to Proceed.....	314
ARTICLE VIII. Publication and Notice.....	317

CHAPTER IX.

GENERAL REGULATIONS IN REGARD TO PLEADING.

ARTICLE I. General Rules of Pleading.....	318
Sec. 1. Form	318
2. What to be Stated.....	320
3. What Facts to be Plead.....	322
4. How Facts to be Plead.....	323
Subd. 1. Certainty	323
Subd. 2. Time	324
Subd. 3. Place	325
Subd. 4. Positiveness	325
5. Exceptions to the General Rules.....	326
Subd. 1. Private Statutes	326
Subd. 2. Account	326
Subd. 3. Judgments	327
Subd. 4. Conditions Precedent.....	328
Subd. 5. Instruments for the Payment of Money only.	329
Subd. 6. Slander and Libel.....	330
ARTICLE II. Formal Rules concerning Pleadings.....	331
Sec. 1. How to be Written and Endorsed.....	331
2. Statement of Facts.....	331

	PAGE.
Sec. 3. Subscription	333
4. Service and Filing.....	333
Subd. 1. Service generally.....	333
Subd. 2. Service on Co-defendant.....	334
ARTICLE III. Verification of Pleadings.....	335
Sec. 1. When required.....	335
2. When omitted	337
3. By whom made.....	339
Subd. 1. By a Party.....	339
Subd. 2. Where Party is a Domestic Corporation...	339
Subd. 3. When the People or a Public Officer are a Party	340
Subd. 4. When Verification may be made by Agent or Attorney	340
4. Form of Verification.....	342
5. Remedy for Defective Verification.....	345
ARTICLE IV. Construction of Pleadings.....	346
Sec. 1. Rules of Construction.....	346
2. What deemed admitted.....	349
ARTICLE V. Copy of Account.....	351
ARTICLE VI. Bill of Particulars.....	353
Sec. 1. In what cases granted.....	353
2. Application for the Order.....	355
3. The Order	357
4. What the Bill should contain.....	358
5. A further Bill.....	359
6. Effect of the Bill.....	359
7. Penalty for Disobedience.....	360
ARTICLE VII. Amendments of Pleadings.....	361
Sec. 1. Amendments of Course.....	361
2. Amendments by leave of the Court.....	364
Subd. 1. Before Trial.....	364
Subd. 2. At the Trial or Hearing.....	368
Subd. 3. After Trial	371
3. Supplemental Pleadings	372
4. Terms of Amendment.....	376
ARTICLE VIII. Frivolous Pleadings.....	379
ARTICLE IX. Sham Pleadings.....	381
ARTICLE X. Irrelevant, Redundant and Scandalous Matter.....	385
ARTICLE XI. Indefinite and Uncertain Allegations.....	388

CHAPTER X.

THE COMPLAINT.

ARTICLE I. What Complaint must contain.....	391
Sec. 1. In general.....	391
2. Caption,—Court and County.....	392
3. Caption,—Names of Parties.....	394

	PAGE.
ARTICLE II. Statement of Facts.....	396
Sec. 1. What Facts to be stated.....	396
2. What should not be stated.....	398
3. How Facts to be stated.....	398
4. How Facts to be stated in Certain Cases.....	400
ARTICLE III. Joinder of Causes of Action.....	402
Sec. 1. What is a Single Cause of Action.....	402
2. What Causes of Action may be Joined.....	405
3. What Causes of Action may not be Joined.....	415
4. How Objection of Misjoinder Taken.....	417
ARTICLE IV. Demand of Judgment.....	417
Sec. 1. For Final Judgment.....	417
2. Interlocutory and Final Judgment.....	421
ARTICLE V. Service of the Complaint.....	422
Sec. 1. When and how to be Served.....	422
2. Consequence of Failure to Serve.....	423

CHAPTER XI.

THE ANSWER.

ARTICLE I. When required.....	425
ARTICLE II. Form, and what to Contain.....	426
Sec. 1. Form	426
2. What to contain.....	426
ARTICLE III. Denials	428
Sec. 1. General Denials	428
2. Specific Denials	430
3. Denials except as Admitted.....	430
4. What is not a Denial.....	432
5. What may be Proved under a General Denial.....	432
ARTICLE IV. New Matter.....	434
Sec. 1. What it is.....	434
2. Defenses	436
3. Partial Defenses	437
ARTICLE V. Counterclaim	439
Sec. 1. What it is.....	439
2. Rules for the Allowance of Counterclaims.....	449
Subd. 1. Against Assignees of Contracts.....	449
Subd. 2. Against Transferee of past due Note.....	451
Subd. 3. Where a Party sues or defends in a Representative Capacity	451
Subd. 4. In Actions for Divorce or Separation.....	453
Subd. 5. In Actions by the People.....	453
3. When should be Pleaded.....	453
Subd. 1. When to be Pleaded.....	453
Subd. 2. How Pleaded	454
Subd. 3. Effect of Pleading Counterclaim.....	455
4. Judgments on the Counterclaim.....	455
ARTICLE VI. Demand of Relief.....	456

CHAPTER XII.

THE REPLY.

	PAGE.
ARTICLE I. When to be Served.....	457
ARTICLE II. What to Contain.....	459
ARTICLE III. Judgment on Failure to Reply.....	460

CHAPTER XIII.

DEMURRER.

ARTICLE I. When it lies.....	462
ARTICLE II. Form and Effect of the Demurrer.....	465
Sec. 1. Form	465
2. When Joined with Answer.....	467
3. Effect	467
ARTICLE III. Grounds of Demurrer to the Complaint.....	468
Sec. 1. That the Court has no Jurisdiction.....	468
2. That the Plaintiff has not Capacity to sue.....	469
3. Another Action pending.....	469
4. Misjoinder of Parties Plaintiff.....	470
5. Defect of Parties.....	471
6. Misjoinder of Causes of Action.....	472
7. No Cause of Action.....	474
ARTICLE IV. Grounds of Demurrer to Pleadings after Complaint..	476
Sec. 1. To the Answer.....	476
2. To the Counterclaim.....	477
3. To the Reply.....	478
ARTICLE V. Amendments after Demurrer.....	479
ARTICLE VI. When Objection taken by Answer.....	481
ARTICLE VII. When Objection is Waived.....	481

CHAPTER XIV.

ARREST AND BAIL.

ARTICLE I. Cases where Order of Arrest may be Granted.....	482
Sec. 1. Where Right depends on Nature of Action.....	482
2. Where Right depends partly upon Extrinsic Facts.....	495
ARTICLE II. Persons Liable to Arrest.....	498
Sec. 1. Who may be Arrested.....	498
2. Who are Privileged from Arrest.....	499
ARTICLE III. Order of Arrest.....	505
Sec. 1. Papers Necessary to obtain the Order.....	505
Subd. 1. The Affidavit.....	505
Subd. 2. The Undertaking	509
2. When and by Whom granted.....	511
3. Contents of the Order.....	514

	PAGE.
Sec. 4. How order Vacated or Modified.....	515
Subd. 1. Time within which Defendant may apply..	515
Subd. 2. How Application is made.....	517
Subd. 3. Where Defendant may apply.....	520
Subd. 4. Stipulation not to Sue.....	521
Subd. 5. Supersedeas	521
ARTICLE IV. Arrest, when and how made.....	524
ARTICLE V. Discharge on Bail or Deposit.....	525
Sec. 1. When Defendant May be Discharged.....	525
2. Defendant's Undertaking, and Justification.....	526
3. Deposit	529
4. Liability of Sheriff.....	531
ARTICLE VI. Charging and Discharging Bail.....	532
Sec. 1. When and how Defendant surrendered.....	532
2. Rights and Liabilities of Bail.....	534
3. Defenses in Actions against Bail.....	536

CHAPTER XV.

INJUNCTIONS.

ARTICLE I. Definition and Nature.....	539
Sec. 1. Definition	539
2. Nature and Object of the Remedy.....	540
ARTICLE II. When Injunction will be granted.....	541
Sec. 1. General Principles	541
2. Where Right depends upon Nature of the Action.....	544
3. Where Right depends upon Extrinsic Facts.....	546
4. Various Cases in which it will be Granted.....	547
Subd. 1. Contracts	548
Subd. 2. Copyright	548
Subd. 3. Corporations	549
Subd. 4. Covenants	554
Subd. 5. Easements	555
Subd. 6. Franchises	556
Subd. 7. Highways	557
Subd. 8. Judicial Proceedings	558
Subd. 9. Nuisances	564
Subd. 10. Office and Official Acts.....	566
Subd. 11. Personal Services	570
Subd. 12. Publications	571
Subd. 13. Patents	572
Subd. 14. Taxes and Assessments.....	572
Subd. 15. Trade Marks.....	573
Subd. 16. Trespasses	576
Subd. 17. Torts	577
Subd. 18. Waste	578
Subd. 19. Water Rights	579

	PAGE.
ARTICLE III. Proceedings to Obtain the Order.....	581
Sec. 1. When Application may be made.....	581
2. By whom granted.....	581
Subd. 1. General Rule.....	581
Subd. 2. Against State Officers.....	583
3. Notice of Application.....	583
4. Papers on which Granted.....	585
5. When an Injunction may be granted to Defendant.....	587
6. Filing Papers	587
ARTICLE IV. The Order.....	588
Sec. 1. Contents of the Order.....	588
2. Service	589
3. Effect of the Order.....	590
4. Violation of the Order.....	591
5. Punishment for Violation.....	592
ARTICLE V. Security	593
Sec. 1. On staying Proceedings in an Action.....	593
2. Security in other Cases.....	597
3. Security in special Cases.....	598
4. New Undertaking on Motion to Vacate.....	598
ARTICLE VI. Damages Sustained by the Injunction.....	599
Sec. 1. Liability	599
2. When the right Accrues.....	600
3. How the Damages are Ascertained.....	601
4. What Damages allowed.....	603
5. Action on the Undertaking.....	605
ARTICLE VII. Vacating or Modifying the Order.....	606
Sec. 1. Without Notice.....	606
2. Upon Notice	607
3. Vacating Injunction upon Undertaking by Defendant....	610
ARTICLE VIII. Effect of subsequent Proceedings in the Action...	611

CHAPTER XVI.

ATTACHMENT.

ARTICLE I. When and by Whom it may be granted.....	612
Sec. 1. Who may Sue out an Attachment.....	612
2. In what Actions it may be granted.....	613
3. Against whom it may be Granted.....	618
Subd. 1. Against a Non-resident.....	618
Subd. 2. Against a Foreign Corporation.....	619
Subd. 3. Against Absconding or Concealed Debtors..	619
Subd. 4. Against one Removing, Assigning, or Secret-	
ing Property	621
Subd. 5. Against one Making False Statement in	
Writing as to His Financial Responsibility.....	623
Subd. 6. Against an Adult Resident, Continuously	
Without the State for More than Six Months, etc..	624
Subd. 7. Against Public Officers.....	625

	PAGE.
Sec. 4. When an Attachment will be Granted.....	626
5. By whom Granted.....	629
ARTICLE II. Papers on which it may be Granted.....	630
Sec. 1. The Affidavit	630
2. Security on Obtaining Warrant.....	640
3. Contents of the Warrant.....	642
ARTICLE III. Execution of the Warrant.....	644
Sec. 1. By whom, and how made.....	644
2. What Property may be Attached.....	646
Subd. 1. Real Property.....	646
Subd. 2. Personal Property	646
3. How Property to be Attached.....	650
Subd. 1. Real Property	650
Subd. 2. Personal Property capable of Manual Deliv- ery	651
Subd. 3. Other Personal Property.....	652
Subd. 4. Upon Property Discovered in an Action under Subdivision 2 of Section 655.....	655
Subd. 5. Effect of the Attachment.....	655
Subd. 6. Certificate and Examination.....	657
4. Rights of Master or Owner of Vessel.....	660
5. Inventory	660
6. Action by Sheriff and Attaching Creditor.....	661
7. Care of the Property.....	666
8. Claim of Property.....	668
9. Proceedings on Claim of Vessel.....	670
ARTICLE IV. Vacating and Modifying Warrant.....	673
Sec. 1. Who may move and when.....	673
2. How Motion may be made.....	676
3. New Proof	678
4. When more than one Motion Allowed.....	680
5. Grounds upon which the Attachment will be Vacated..	681
6. Effect of Vacating the Attachment.....	682
7. Application for Discharge of Property.....	683
Subd. 1. Who may make it.....	683
Subd. 2. Undertaking	684
Subd. 3. Discharge of Vessel under the Attachment..	686
Subd. 4. Application by Partners to Discharge At- tachment	687
ARTICLE V. Regulations where there are two or more Warrants against the same Defendant.....	688
Sec. 1. Levy under a Junior Warrant.....	688
2. Attachment of Foreign Vessel under Junior Warrant...	689
3. Rights of Junior Plaintiff as to Actions.....	690
4. Rights of Third and other Attaching Creditors.....	690
ARTICLE VI. Proceedings after Judgment.....	691
Sec. 1. Execution	691
2. Judgment, how enforced.....	692

	PAGE.
ARTICLE VII. Proceedings after Warrant has been vacated, or Attachment Discharged	694

CHAPTER XVII.

RECEIVERS, AND OTHER PROVISIONAL REMEDIES.

ARTICLE I. Receiver	697
Sec. 1. Who may be Receiver	697
2. Double Receiver	699
3. Appointment	701
ARTICLE II. When and in what cases Appointed	703
Sec. 1. Before final Judgment	703
Subd. 1. In what cases	703
Subd. 2. Application and notice	710
2. By or after final Judgment	711
ARTICLE III. Rights and Liabilities of Receivers	713
Sec. 1. Security	713
2. What passes to Receiver	714
3. Powers of Receiver	717
4. How controlled	721
5. Liabilities	722
6. Compensation	724
7. How discharged or removed	725
ARTICLE IV. Receivers of Corporations	727
Sec. 1. In what cases Appointed	727
Subd. 1. Under the Code	727
Subd. 2. Under special Statute	731
Subd. 3. Application, where made	734
Subd. 4. Who may be Receiver of a Corporation	736
Subd. 5. Security	737
2. General Powers and Duties	738
3. Changing and discharging Receivers	747
4. Commissions	749
ARTICLE V. Deposit, Delivery or Conveyance	751
ARTICLE VI. General Provisions	752
Sec. 1. Electing between provisional Remedies	752
2. Time for deciding Motions, limited	752
3. Defendant's Right to provisional Remedies	753

CHAPTER XVIII.

TENDERS AND OTHER OFFERS.

ARTICLE I. Tender after Suit	754
Sec. 1. When it may be made	754
2. How to be made	755
3. Effect of Tender	758
4. When to be deducted from Recovery	759

	PAGE.
Sec. 5. Payment into Court.....	760
6. Care and Disposition of Money paid into Court.....	672
ARTICLE II. Satisfaction of Part of Plaintiff's Claim.....	764
ARTICLE III. Offer to liquidate Damages.....	767
Sec. 1. When it may be made.....	767
2. Effect of Acceptance or Refusal.....	767
ARTICLE IV. Offer to compromise.....	768
Sec. 1. When made by Defendant.....	768
2. When made by Plaintiff.....	772
3. Acceptance	772
4. Effect of Refusal.....	773

CHAPTER XIX.

MISTAKES, OMISSIONS AND IRREGULARITIES.

ARTICLE I. Amendments	776
Sec. 1. What may be amended.....	776
Subd. 1. General Principles	776
Subd. 2. Amendment of Summons.....	779
Subd. 3. Processes other than Summons.....	781
Subd. 4. Judgments and Judgment rolls.....	782
Subd. 5. Amendments of Miscellaneous Proceedings..	787
Acknowledgments	787
Affidavits	787
Attachment	788
Bonds and Undertakings.....	788
Cases	790
Commissions	791
Notices of Appeal.....	791
Orders	791
Petitions	792
Remittiturs	792
Returns	792
Sheriff's Certificates and Deeds.....	792
Verdicts	793
2. Application for Amendment.....	794
3. Mode of Amendment.....	794
4. Effect of Amendment.....	795
ARTICLE II. Relief against Omissions and Mistakes.....	796
ARTICLE III. Irregularities	798
Sec. 1. What are Irregularities.....	798
2. Who may take Advantage of Irregularity.....	800
3. Remedy for Irregularity.....	801
4. Waiver of Irregularities.....	804
ARTICLE IV. Defects cured by Verdict or Judgment.....	805

CHAPTER XX.

ABATEMENT AND REVIVAL.

	PAGE.
ARTICLE I. When Actions Abate.....	807
Sec. 1. General Rule	807
2. Rules Applicable to particular Actions.....	809
Subd. 1. What does not abate.....	809
Subd. 2. What actions do abate.....	812
ARTICLE II. Continuance upon death of Party.....	814
Sec. 1. When sole Party dies.....	814
2. Where one of several Parties dies.....	819
Subd. 1. If the entire Cause of Action survives....	819
Subd. 2. If Part of the Cause of Action survives....	821
Subd. 3. In other Cases.....	821
ARTICLE III. Transfer of Interest, or Devolution of Liability....	822
Sec. 1. Actions in General.....	822
2. Actions by and against Public Officers.....	824
3. Special Cases	825
ARTICLE IV. How new Parties brought in.....	827
ARTICLE V. When Court may order Action abated.....	829
ARTICLE VI. Effect of Verdict, Report or Decision.....	829
Sec. 1. Death of Party after Verdict, etc.....	829
2. No Verdict to be taken after Party's death.....	831

CHAPTER XXI.

DISCOVERY OF BOOKS AND PAPERS.

ARTICLE I. When ordered.....	832
Sec. 1. What Courts may make Order.....	832
2. When granted	832
Subd. 1. Rules applicable to all Cases.....	832
Subd. 2. Before Issue.....	837
Subd. 3. After Issue	840
ARTICLE II. Petition and Order.....	842
Sec. 1. What Petition shall contain.....	842
2. Order to show Cause.....	845
3. Order for Discovery, what to contain.....	845
4. When Order may be Vacated.....	846
5. Proceedings on Return of the Order.....	847
6. Proceedings under the Order.....	848
7. Effect of Papers, etc., Produced.....	849
8. Penalty for Disobedience	849

TABLE OF CASES.

A.

Aaron v. Lee.....	191	Alamango v. Superv's Albany Co.	349
Abbet v. Blohm.....	43, 232	Albany & N. R. R. Co. v. Brownell	569
Abbott v. Am. Hard Rub. Co.	549	Albany Brass etc. Co. v. Hoffman	840
Abbott v. Curran.....	192	Albany City Ins. Co. v. Van Vranken	719
Abbott v. Jewett.....	780	Albany City Sav. Bank v. Burdick	334
Abbott v. Meinken.....	370	Albany Co. Bk. v. Rider....	383
Abeel v. Conhyser.....	235	Albert Palmer Co. v. Shaw..	362
Abeel v. Van Gelder.....	169	Aldrich v. Reynolds.....	603
Abell v. N. Y., L. E. & W. R. Co.....	591	Alexander v. Bennett.....	66
Abrams v. Levine.....	633	Alexander v. Myers.....	135, 136
Acker v. Jackson.....	636, 639	Alford v. Berkele.....	711
Acker v. Leland.....	393	Alford v. Cobb.....	616, 636
Ackerman v. Ackerman....	51	Allaire v. Kalfon.....	511
Ackroyd v. Ackroyd.....	279	Allen v. Addington.....	793
Adams v. Bissell.....	412	Allen v. Allen.....	396
Adams v. Bowe.....	23	Allen v. Brown.....	145
Adams v. Fassett.....	109	Allen v. Fosgate.....	163
Adams v. Gilbert.....	43	Allen v. Fowler & Wells Co..	794
Adams v. Green.....	151	Allen v. Godfrey.....	5, 800
Adams v. Henry.....	189	Allen v. Herschorn.....	623
Adams v. McPartlin.....	381	Allen v. Hyde.....	496
Adams v. Nellis.....	43	Allen v. Malcolm.....	218, 219
Adams v. Olin.....	111, 112, 116	Allen v. Meyer.....	261, 614, 639
Adams v. Roberts.....	458, 461	Allen v. Mille.....	114
Adams v. Sherrill.....	328	Allen v. N. J. South. R. R. Co	148
Adams v. Speelman.....	652	Allen v. Patterson..	319, 321, 397
Adams v. Supervisors.....	76	Allen v. Stone.....	43
Adriance v. Lagrave.....	504	Allen v. Webster.....	115
Adriance v. Sanders.....	837	Allen v. Wharton.....	201
Agate v. Lowenbein.....	555	Allentown F. & M. Works v. Loretz	559
Agt. State Prison v. Rikeman	157	Alliance Ins. Co. v. Cleveland	491
Ahoyke v. Walcott.....	849	Allis v. Leonard.....	431
Aikins v. Colton.....	760, 761		
Akin v. Alb. & Northern R. R. Co.	190		

Almy v. Thurber.....	657, 665	Argall v. Bachrach.....	222
Altman v. Hofeller.....	787	Argall v. Jacobs.....	458
Am. Distrib. Co. v. Distilling, etc. Co.	659	Argotsinger v. Vines.....	458
Am. D. & I. Co. v. Staley.....	454, 458	Argus Co., Matter of.....	249
Am. Grocery Co. v. Flint....	307	Armitage v. Hoyle.....	560
Am. Insulator Co. v. B. & M. Tel. Co.	340	Armstrong v. Danahy.....	428
Am. Ins. Co. v. Oakley.....	43	Armstrong v. Hall.....	414
American U. Tel. Co. v. Mid- dleton	58, 518	Armstrong v. People.....	52
Ammon v. Kellar.....	507	Armstrong v. Phillips....	362, 385
Amoskeag Manufacturing Co. v. Spear	573, 574	Arnal v. Rahlff.....	316
Amsinck v. Northrup.....	192	Arnold v. Dimon.....	437
Anderson v. Doty....	337, 542, 578	Arnold v. Downing.....	91
Anderson v. Hill.....	408	Arnold v. Shapiro.....	495
Anderson v. Hitchcock.....	125	Arrex v. Brodhead.....	24
Anderson v. Roberts.....	800	Arrow S. S. Co. v. Bennett..	359
Anderson v. Sibley.....	116	Artaega v. Conner.....	527, 531
Anderson v. Spears.....	332	Arthur v. Brooks.....	477
Anderson v. Treadwell.....	706	Arthur v. Griswold.....	818
Anderton v. Wolf.....	471, 473	Arthur v. Homestead F. Ins. Co.	458
Andrews v. Artisans' Bank..	448	Ash v. Cook.....	817, 826
Andrews v. Astor Bk.....	320	Astor v. Pelache.....	768
Andrews v. Cleveland.....	355	Atkins v. Saxton.....	647
Andrews v. Harrington.....	196	Atkinson v. Manks.....	310, 311
Andrews v. Schofield.....	633	A. & P. Tel. Co. v. B. & O. R. R. Co....	201, 588, 590, 592
Androvette v. Bowne.....	584	Atlantic Dock Co. v. Leavitt.	554
Annin v. Wren.....	58	Attorney, Matter of....	30, 31, 32
Annis v. Upton.....	456	Attorney, Matter of H..	33, 45, 47
Anon.....	40, 264, 287, 288, 420	Atty. Gen. v. Bk. of Columbia	698
Anonymous.....	23, 135, 427	Atty. Gen. v. Cohoes Co....	563
Anonymous (Roebing v. Dun- can)	495	Atty. Gen. v. Cont'l L. Ins. Co.	282
Ansley v. Patterson.....	56	Atty. Gen. v. Guardian Mut. L. Ins. Co....	231, 552, 728, 736
Ansorge v. Kaiser.....	450	Atty. Gen. v. Life & F. Ins. Co.	745, 746
Anthony v. Day.....	362	Atty. Gen. v. Mayor, etc....	553
Anthony v. Fox.....	632	Atty. Gen., Matter of.....	129
Anthony v. Stype.....	622	Atty. Gen. v. North America L. Ins. Co.....	131, 552, 724
Anthony v. Wood.....	649, 656, 664, 665	Attrill v. Rockaway.....	748
Appleby v. Robinson.....	538	Auburn & Cato Plank Road Co. v. Douglas.....	556
Appleton v. Casey.....	720	Auerbach v. D. L. & W. R. R. Co.	834
Apollinaris Co. v. Venable....	600	Augner v. Mayor.....	615, 616
Archer v. English.....	761	Augrich v. McOwen.....	590, 790
Arctic F. I. Co. v. Hicks.....	5		

August v. 4th Nat. Bank....	275	Baker v. Sutton.....	358
Aultman & Taylor Co. v. Syne	293, 294	Baker v. Wales.....	200
Austin v. Monroe.....	43	Bakeman v. Pooler.....	756
Averell v. Barber.....	272	Baldwin v. Eazler.....	725
Averill v. Williams.....	40	Baldwin v. Latson.....	36
Avery v. Slack.....	196	Baldwin v. Roberts.....	123
Avery v. Willis.....	74	Balestier v. Metropolitan Nat. Bank	751
Ayers v. O'Farrel.....	458	Ball v. Evening Post Pub. Co. 354, 355	
Ayres v. Covill.....	332	Ball v. Mander.....	293
Ayres v. Lawrence.....	464, 554, 567, 573	Ballard v. Fuller.....	519
Ayres v. Valentine.....	795	Ballou v. Parsons.....	284, 350

B.

Babbitt v. Crampton.....	833	Balson v. Meggatt.....	22
Babcock v. Clark.....	78	Baltimore & O. R. Co. v. Arthur	310, 312
Babcock v. Clarke.....	583	Bamberger v. Kahn.....	510, 511
Babcock v. Kuntzsch....	252, 787	Bangs v. Duckinfield....	729, 736
Bach v. Pacific Mail S. S. Co.	550	Bangs v. Selden.....	77, 248, 267
Bache v. Purcell.....	175	Bank Com'rs v. Bk. of Buffalo	41
Bachmann v. Wagner.....	239	Bank of Com. v. R. & W. R. R. Co.	209
Bacon v. Cropsey.....	800	Bank of Cumberland v. South- erland	761
Bacon v. Frisbie.....	53	Bank of Genesee v. Spencer..	266
Bacon v. Kendall.....	494	Bank of Geneva v. Reynolds..	533
Bacon v. Magee.....	261	Bank of Havana v. Magee....	396
Badger v. Benedict.....	412	Bank of Havana v. Moore....	525
Badger v. Gilroy.....	251, 351, 352, 353	Bank of Kinderhook v. Gifford	779
Baere v. Armstrong.....	641	Bank of Lowville v. Edwards 381, 391, 469	
Bagaley v. Vanderbilt.....	542	Bank of Mut. Redemp. v. Stur- gis	657, 701
Bagg v. Robinson.....	545, 586	Bank of Ogdensburgh v. Ar- nold	707
Bailey v. Belmont.....	701	Bank of Rochester v. Emerson	778
Bailey v. Co. of Buchanan....	755	Bank of U. S. v. Strong.....	306
Bailey v. Inglee.....	140	Bank v. Suydam.....	52
Bailey v. Murphy.....	49, 51	Bank of Utica v. Mersereau..	53
Bailey v. Prince.....	519	Banks v. Am. Tract Society..	611
Bailey v. Warden.....	23	Bannerman v. Quackenbush..	780
Bain v. Globe Ins. Co.....	205	Bannister, Matter of.....	262
Baird v. Sheehan.....	435	Banque Agricole v. Ungureau	507
Baird v. Walker.....	113	Banyer v. Empire.....	169
Baker v. Bailey.....	427	Baptist Soc. v. Tabernacle...	284
Baker v. Brown.....	312	Barber v. Bennett.....	387
Baker v. Curtis.....	538	Barber v. Goodell.....	212
Baker v. Curtiss.....	315, 333, 423, 424	Barbour v. Boas.....	314
Baker v. Hunt.....	760		
Baker v. Nussbaum.....	766		
Baker v. Stephens.....	216		

Barclay v. Brown.....	795	Barton v. Fisk.....	604
Barclay v. Quicksilver Min. Co.	719	Barton v. Griffen.....	380, 431
Bard v. Poole.....	177	Barton v. Hosner.....	151
Barhyte v. Hughes.....	443	Barton v. Speis.....	423
Barker v. Burton.....	177	Bartow v. Sidway.....	352
Barker v. Cassidy.....	113	Bass v. Comstock.....	464, 472
Barker v. Cook.....	252, 525	Bassett v. Leslie.....	310
Barkley, Matter of..	248, 582, 607	Bate v. Fellowes.....	378
Barkley v. N. Y. C., etc. R. Co.	44	Bate v. McDowell.....	641
Barkley v. Rens. & Saratoga R. R. Co.....	351	Bates v. Jaines.....	268
Barkley v. Wilcox.....	580	Bates v. N. Orleans R. R. Co.	208
Barnard v. Heydrick.....		Bates v. Plonsky.....	664
	188, 192, 224, 780, 791	Bates v. Rosenkrans.....	348
Barnard v. Onderdonk.....	174	Bates v. Salt Springs Nat. Bank	377
Barnes v. Blake.....	173	Bathgate v. Haskin.....	
Barnes v. Gilmore.....	447		113, 405, 442, 768, 774
Barnes v. Henshaw.....	360	Bathmann v. Bathmann.....	707
Barnes v. Mobile, etc., R. R. Co.	208	Batlett v. Halligan.....	21
Barnes v. Perine.....	396	Batterman v. Finn.....	590
Barnes v. Smith.....	416	Batterson, Matter of.....	34
Barnett v. Meyer....	366, 778, 779	Bauer v. Schevitch.....	510
Barnett v. Selling.....	489	Baum, Matter of.....	30
Barnum, Matter of.....	244	Baumgarten, Matter of.....	76
Baron v. Biaren.....	628	Baum's Castorine Co. v. Thomas	382, 455
Baron v. Cohen.....	42	Bayard v. Smith.....	323
Barr v. N. Y., L. E. & W. R. R. Co.	149	Baylis v. Stimson.....	430
Barr v. Shaw.....	407	Baxter v. Drake.....	498
Barrett v. Am. T. & T. Co.	205, 206	Baxter v. McDonnell.....	468
Barrett, Matter of.....	59	Baxter v. Mo. Kan. & T. R. R. Co.	659
Barrett v. Palmer.....	58	Baxter v. Seaman.....	252
Barrett v. Third Ave. R. R. Co.	40	Beach v. Bay State Co.....	348
Barrington Appr't Ass'n v. Watson	554	Beach v. Cooke.....	419
Barron v. Martense.....	179	Beacom v. Rogers.....	201
Barron v. So. Brooklyn Saw Mill Co.....	190, 628, 818	Beal v. Union Paper Box Co..	380
Barry v. Coville.....	53	Bean v. Tonnelle.....	256, 508
Barry v. Fisher.....	650	Bear v. Am. Rapid Tel. Co..	472
Barry v. Mut. Life Ins. Co. of N. Y.....	285, 559	Beards v. Wheeler.....	768, 769
Bartlett v. Judd.....	102	Beardsley v. Root.....	41
Bartlett v. Spicer.....	60	Beardsley v. Stover.....	366
Barton v. Barton.....	778	Bech v. Ruggles.....	306
		Bechtle v. Man. Ry. Co.....	136
		Beck v. Allison.....	365
		Beck v. Stephani.....	310
		Becker v. Boon.....	435, 758, 761
		Becker v. Cherry Creek.....	247

Becker v. Hager.....	285, 584	Bennett v. Leach.....	168
Becker v. Howard.....	242	Bennett v. Leeds Mfg. Co....	429
Becker v. Van Valkenburgh..		Bennett v. Matthews.....	439
	84, 87, 88	Bennett v. Mulry.....	298
Beckley v. Chamberlin.....	339	Bennett v. Pratt.....	251
Beckman v. Cutler.....	200	Bennett v. Whitney.....	395
Bedell v. Shaw.....	88, 89	Benninghoff v. Oswell.....	504
Bedford v. Am. Alum. Co....	549	Bensel v. Lynch.....	531
Bedlow v. Stillwell.....	379	Benson v. Sayre.....	238
Beebe v. Robert.....	143	Bentley v. Smith.....	394
Beers v. Chelsea Bank.....	748	Benton v. Sheldon.....	19
Beers v. Hendrickson.....	40	Berdan v. Greenwood.....	760
Beers v. Shannon.....	395	Berdell v. Berdell.....	167
Beitz v. Fuller.....	784	Bergen v. Boerum.....	251
Belden v. Wilkinson.....	57	Bergen v. Wyckoff.....	181
Bell v. Gittere.....	74	Berks v. Hotchkiss.....	34
Bell v. Good.....	230	Bernard v. Morrison.....	467
Bell v. Merrifield.....	418	Berney v. Drexel.....	348, 470
Bell v. Tilden.....	143	Berrian v. Methodist Soc....	206
Bell v. Vernoooy.....	14	Berrien v. Wright.....	108
Bell v. Yates.....	434*	Bertha Zinc, etc. Co. v. Clute	586
Bellamy v. Guhl.....	199, 784	Berthold v. Wallach.....	6
Bellinger v. Gardiner.....	510, 790	Best v. Palmer.....	784
Bell Telephone Co. v. Home		Best v. Vedder.....	813
Tel. Co.	795	Best v. Zeh.....	173
Belmont v. Cornen.....	221, 222	Bettis v. Goodwill.....	769
Belmont v. Erie R'y Co.....		Betts v. Betts.....	780
	271, 272, 550, 732	Betzemann v. Brooks.....	626
Beman v. Todd.....	239, 243	Bewley v. Equitable Life Ins.	
Bender v. Sherwood.....	311, 766	Co.	367, 778, 794
Bender v. Terwilliger.....	173	Beyer v. Clark.....	135
Bendit v. Annesley.....	437	Beyer v. Wilson.....	344
Benedict v. Arnoux.....	230	Bidwell v. Astor Mut. Ins. Co.	397
Benedict v. Benedict.....	600	Bien v. Freund.....	450
Benedict v. Guardian Tr. Co.	616	Bierce v. Smith.....	798
Benedict v. Seymour.....	332	Bigelow v. Bush.....	176
Benedict, etc., Mfg. Co. v.		Bigelow v. The Whitehall	
Thayer	24, 782	Mfg. Co.	340
Benjamin v. E. J. & C. R. R.		Bilas v. Butler.....	232
Co.	175	Bildersee v. Aden.....	683, 685
Bennett v. American Art Un.	548	Billhofer v. Herbach.....	164
Bennett v. Brown.....	642	Billings v. Baker.....	363
Bennett v. Chapin.....	725	Billings v. Carver.....	591
Bennett v. Complete Elec.		Bills v. Nat. Park Bk.....	656
Cons. Co.....	655	Binney v. LeGal.....	770
Bennett v. Cook.....	105	Birdsall v. Fuller.....	12
Bennett v. Edwards.....	633	Bird v. Hayden.....	59
Bennett v. Gray.....	167	Bird v. Lanphear.....	706

Bishop v. Sullivan.....	363	Bomberger v. Turner.....	428
Bissell v. N. Y. C. & H. R. R. R. Co.....	196, 264, 796	Bomeisler v. Forster.....	558
Black v. Rodger.....	682	Bonadua v. Third Ave. R. Co.	136
Blackwell, Matter of.....	796	Bond v. Smith.....	810, 821
Blaisdell v. Raymond.....	338	Bondy v. Collier.....	510
Blake v. Bannes.....	389	Bonnell v. Griswold.....	149, 349, 411
Blake v. City of Brooklyn...	554	Bonnell v. R. W. & O. R. R. Co.	814
Blake v. Eldred.....	387	Bonnell v. Wheeler.....	411
Blake v. Griswold.....	808	Bonynge v. Field.....	42
Blake v. Mich. So. R. R. Co.	306	Bonynge v. Waterbury.....	42
Blakelee v. Buchanan.....	485	Bookhout, Matter of....	68, 260
Blakemore v. Glamorganshire, etc., Co.	541	Boorman v. A. & P. R. R. Co.	835
Blanc v. Blanc.....	375	Booth v. Clark.....	131, 719
Blanchard v. Strait.....	191	Booth v. Kingsland, etc....	213
Blank v. Hartshorn....	332, 397	Booth v. Smith.....	705
Blatchford v. Ross.....	550	Borneman, Matter of..	6, 34, 203
Bleakley, Matter of.....	33, 41	Borst v. Corey.....	94
Blewett v. Baker.....	756	Bort v. Snell.....	157
Bliss v. Bliss.....	791	Boscher v. Roullier.....	682
Bliss v. Molter.....	302, 685	Bosley v. N. M. Co.....	95
Bliss v. Winters.....	334	Bossert v. Poerschke....	370, 372
Blodget v. Conklin.....	771	Boston Loco. Wks. v. Wright	342
Bloete v. Simon.....	160	Boston Nat. Bk. v. Armour..	264
Bloodgood v. Ayres.....	580	Boston Silk & W. Mills v. Eull	440
Bloodgood v. Bruen.....	115, 117	Bostwick v. Dry Goods Bk...	464
Bloodgood v. Slayback...	833, 835	Bostwick v. Elton.....	586
Bloom v. Pond's Extract Co.	835	Bostwick v. Menck.....	374
Bloomingdale v. Barnard...	562	Boucicault v. Boucicault.	497, 513
Blossom v. Estes.....	615, 627	Boughton v. Flint.....	112
Blumberg v. Lindeman.....	839	Bourdon v. Martin.....	722
B. M. G. L. Co., Matter of...	75	Bowdoin v. Coleman.....	371
Board of Education v. King..	839	Bowe v. Arnold.....	664
Board of Supervisors v. Walter	100	Bowe v. Wilkins.....	683
Boardman v. Lake Shore & M. S. R. R. Co.....	104	Bowen v. First Nat'l Bank..	675
Bockover v. Harris.....	442	Bowen v. Stilwell.....	506
Bogardus v. N. Y. Life Ins. Co.	349, 467	Bowers v. Durant.....	58, 707
Bogart v. Dart....	616, 618, 620	Bowery Bank, In Re.....	698, 699, 725
Bogart v. Sweezy.....	627, 628	Bowery Sav. Bk. v. Malher...	312
Bogert v. Vermilya.....	105	Bowie v. Brahe.....	24
Bohanan v. Peterson.....	34	Bowles v. Van Home.....	316
Boker v. Curtis.....	595	Bowling Green Sav. Bk. v. Todd	33, 34
Bolles v. Duff.....	273, 274	Bowman v. Bowe.....	517
Bolton v. Shriver.....	86	Bowman v. Earl.....	359
		Bowman v. Gates.....	514
		Bowman v. Sheldon..	252, 386, 788

Boyce v. Brown.....	320, 321	Brewster v. Sackett.....	357
Boyd v. Murray.....	706, 707	Brewster v. Stewart.....	305
Boyd v. Vanderkemp.....	5, 781	Brewster, Matter of.....	30
Boyle v. City of Brooklyn....	399	Bridenbacker v. Hoard.....	146
Boyle v. S. I. L. Co.....	305	Bridenbecker v. Mason.....	
Boyle v. Thurber.....	813		768, 770, 771, 800
Boylen v. McAvoy.....	187	Bridge v. Payson.....	436
Boylston v. Wheeler.....	179	Bridges v. Wyckoff.....	88
Boynton v. Squires.....	165	Brien v. Casey.....	212
Bracken v. Atlantic Trust Co.	158	Briggs v. Freedman.....	382
Brackett v. Griswold.....	813.	Briggs v. Gaunt.....	304
Bradbury v. Winterbottom..		Briggs v. Partridge.....	143
	764, 766, 767	Briggs v. Vick.....	571
Bradley v. Aldrich.....	419	Brinckerhoff v. Bostwick....	
Bradley v. Fisher.....	32		56, 119, 160, 720
Bradley v. Parker.....	682	Brinkerhoff v. Perry.....	389
Bradley v. Sheehy.....	367	Brittan v. Peabody.....	257, 258
Bradner v. Holland.....	406, 473	Broadhead v. Broadhead....	296
Bradner, Matter of.....	297, 521	Brodie v. Cronley.....	589
Bradstreet v. Bailey.....	847	Broiestedt v. South Side R. R.	
Bradt v. Church..	89, 168	of Long Island.....	527
Brady v. Brundage.....	501	Bronk v. Riley.....	546
Brady v. Waldron.....	579	Brooke v. Foster.....	666
Brady v. Weeks.....	565	Brooklyn Trust Co. v. Bulmer	227
Brainard v. Jones.....	163, 471	Brooks v. Hanchett..	247, 296, 387
Brainerd v. White.....	238, 244	Brooks v. Mortimer.....	772
Brake, Matter of.....	280	Brooks v. N. Y. & Greenwood	
Brandon v. Brandon.....	102	L. R. R. Co.....	232
Brandon Mfg. Co. v. Pettin-		Brooks v. Patterson.....	39
gill	190	Brooks v. Schultz.....	261
Brandreth v. Lance.....	571	Broome v. Taylor.....	329
Branth v. Branth.....	51	Broosington v. Rohrs.....	481
Brash v. Wielarsky....	640, 682	Brotherson v. Consalus.....	46
Bray v. Farwell.....	146	Brower v. Williams.....	544
Bray v. Poillon.....	604	Brown v. Ashbough.....	488
Brayton v. N. Y., L. E. & W.		Brown v. Babcock.....	152
R. R. Co.....	206	Brown v. Beckmann.....	785
Breen v. Lennon.....	243	Brown v. Brown.....	150, 229
Brehm v. Mayor.....	109	Brown v. Buckingham.....	446
Breiman v. Paasch.....	485	Brown v. Cook.....	290
Brett v. First Universalist		Brown v. Crabb.....	179
Society	162	Brown v. Delafield.....	105
Bretz v. Mayor, etc.....	323	Brown v. Feeter.....	350
Breunich v. Weselman.....	436	Brown v. Ferguson..	754, 755, 757
Brewer v. Knapp.....	209	Brown v. Gallaudet.....	454
Brewer v. Temple.....	408	Brown v. Guthrie.....	665
Brewer v. Tucker.....	675, 677	Brown v. Haff.....	497
Brewster v. Hodges.....	547	Brown v. Harman.....	323

Brown v. Leigh.....	361	Bunker v. Langs.....	232
Brown v. Marrigold.....	213	Burbank v. Beach.....	158
Brown v. Mayor.....	47, 51	Burbank v. Fay.....	83
Brown v. McCune.....	500	Burch v. Cavanaugh....	422, 577
Brown v. Nichols....	43, 232, 706	Burchard, Matter of....	29, 30
Brown v. O'Brien.....	98	Burd, Matter of.....	32
Brown v. Richardson.....	375	Burdell v. Burdell.....	712
Brown v. Ryckman.....	321	Burden v. Burden.....	835
Brown v. Saratoga R. R. Co.	480	Burdick v. Freeman.....	56, 57
Brown v. Story.....	137	Burger v. Baker.....	803
Brown v. Traveller's Ins. Co.	42	Burgess v. House.....	765
Brown v. Volkening.....	178	Burham v. Brennan.....	792
Brownell v. Akin.....	497	Burhans v. Casey.....	492, 766
Brownell v. Bk. Gloversville		Burhans v. Tibbitts.....	793
	388, 390, 839	Burke v. Ashley.....	329
Brownell v. Marsh.....	257	Burkhardt v. McClellan....	655
Browning v. Abrams.....	504	Burkhardt v. Sanford.....	655
Brox v. Riber.....	244	Burlew v. Hunter.....	434
Bruce v. D. & H. Canal Co.	544	Burlingame v. Parce.....	707
Bruce v. Kelly.....	406, 487	Burnett v. Bookstaver....	166
Bruce v. Tilson.....	102	Burnett v. Westfall.....	769
Brummer v. Cohen.....	838	Burnham v. Acton.....	540
Brumskill v. James.....	165	Burns v. O'Neil.....	324
Brush v. Barrett.....	113	Burns v. Robbins.....	528
Brush v. Hoar.....	122	Burr v. Burr.....	101
Brush v. Lee.....	35	Burrall v. Moore.....	363, 381
Buchan v. Sumner.....	777	Burrell v. Hollands.....	21
Buchholz v. N. Y., L. E. &		Burrill v. Preston.....	98
W. R. R. Co.....	564, 565	Burritt v. Press Pub. Co....	
Buckbee v. Brown.....	143		309, 310, 311
Buckingham v. Swezy....	620, 682	Burstall v. Horner.....	760, 761
Buckingham v. White.....	659	Burtis v. Dickinson.....	674
Buckley v. Buckley.....	43	Burton v. Burton.....	822
Buckley v. Eckert.....	650	Burton v. Sherman.....	232
Bucklin v. Chapin.....	119	Burton Co. v. Cowan.....	190
Bucknam v. Brett.....	820	Busch Brewing Co., Matter of	700
Budd v. Bingham.....	415	Bush v. Abrahams.....	70
Budd v. Walker.....	117	Bush v. Hicks.....	560
Buell v. B. & O. S. W. R. R.		Bush v. O'Brien.....	40
Co.	209	Bush v. Prosser.....	319, 438
Buell v. VanCamp....	253, 620, 633	Bush v. Shaw.....	94
Buhl v. Ball.....	623, 635, 677	Butcher v. Pearson.....	665
Buhler v. Wentworth.....	437	Butchers' & Drov. Bank v.	
Bulkley v. Bulkley.....	203	Jacobson	330
Bullock v. Bemis....	367, 368, 371	Butler v. Fayerweather....	52, 53
Bullock v. Bullock.....	355	Butler v. Johnson.....	96
Bullymore v. Seward.....	334	Butler v. Kelsey.....	5
Bunce v. Reed.....	294	Butler v. Mason.....	398

Butts v. Schieffelin.....	800
Butts v. Wood.....	160
Byrnes v. Dunn.....	365
Byxbie v. Wood.....	145

C.

C. & R. Plank Road Co. v. Parker	74
Cadwell v. Goodenough.....	359
Cafiero v. Dematrino.....	528
Cagger v. Lansing.....	167
Cahill v. Manhattan R. R. Co.	135, 136
Calhoun v. Hallen.....	431
Calkin v. Beattie.....	315
Calkins v. Isbell.....	116
Callanal v. Gilman.....	557
Calvo v. Davies.....	475
Camp v. Barney.....	722, 723
Camp v. Hallen.....	91
Camp, Matter of.....	96, 807
Camp v. Niagara Bank.....	746
Campbell v. Am. Zylonite Co.	295
Campbell v. Bristol.....	43
Campbell v. Carter.....	577
Campbell v. Conner.....	660
Campbell v. Ernest.....	546
Campbell v. Grove.....	251
Campbell v. Hoge.....	833, 841
Campbell v. Hughes.....	101
Campbell v. Seaman.....	564
Campbell v. Spencer.....	290
Campbell v. Stokes.....	173
Campbell v. Spratt.....	726
Campbell v. Taylor.....	222
Campbell v. Wright.....	407
Campion Card & Paper Co. v. Searing	616
Canal & Walker Sts., Matter of	65
Candee v. Doying.....	352
Candee v. Wilson.....	511
Canfield v. Ford.....	174
Carey v. Reilly.....	6
Carlton v. Carlton.....	221
Carman v. Plass.....	414
Carpenter v. Adams.....	379, 381

Carpenter v. Danforth.....	609
Carpenter v. Fisher.....	611
Carpenter v. Keating.....	595
Carpenter v. Manhattan L. Ins. Co.	447
Carpenter v. N. Y. & N. H. R. R. Co.	549
Carpenter v. O'Dougherty....	175
Carpenter v. Stillwell.....	23
Carpenter v. West.....	386
Carpenter v. Willett.....	531
Carr v. Carr.....	167
Carr v. Corcoran.....	650
Carr v. Rischer.....	829, 830
Carrier v. Dellay.....	377
Carstens v. Barnstorf.....	42
Carter v. DeCamp.....	466, 473
Carter v. Koezley.....	328
Carter v. Sully.....	306
Carter v. Youngs.....	215
Casola v. Vasques.....	623
Casper v. Wallace.....	649
Cass v. Higenbotam.....	755, 757
Cassidy v. Daly.....	413
Castle, Matter of.....	130
Castoriano v. Dupe.....	542
Cassucci v. A. & K. R. R. Co.	48, 49
Castree v. Kirby.....	488
Catlin v. Doughty.....	123
Catlin v. Gunter.....	371, 778
Catlin v. Ricketts.....	627
Cattus, Matter of.....	34
Cauchois v. Proctor.....	458
Cayuga Co. Bk. v. Warden...	794
Cemetery B'd. v. Teller.....	195
Center v. Billinghamurst.....	782
Central Bank v. Thein.....	384
Central Cross T. R. R. Co. v. Bleeker St., etc., R. R. Co..	585, 608
Central Crosstown R. R. Co. v. Met. St. Ry. Co.....	565
Central Cross Town R. R. Co. v. Twenty-third St. R. R. Co.	835
Central Nat. Bk. v. White...	835, 847

Cercle Francais de L'har-	Chawviteau v. Fay.....	459
monie v. French.....	Cheetham v. Tillotson....	794, 795
Chadbourne v. D. L. & W. R.	Chem. Natl. Bk. v. Carpentier	
R. Co.		328, 379
Chadwick v. Chase.....	Cheney v. Rankin.....	811
Chadwick v. Manning.....	Chester, <i>ex parte</i>	125
Chadwick v. Spargur.....	Chester v. Jumel.....	46
Chaffee v. Jones.....	Chillcott v. Waddingham....	315
Chamberlain v. B., N. Y. & P.	Chilson v. Howe.....	38
R. R. Co.....	Chipman v. Montgomery....	151
Chamberlain v. Dempsey....	Chittenden, Matter of.....	33
Chamberlain v. Greenleaf....	Christal v. Kelly.....	364, 777
Chamberlain, Matter of.....	Christian Jensen Co., Matter	
Chamberlain v. Roch. Seam-	of	715, 730
less P. V. Co.....	Christie v. Bogardus....	595, 596
Chamberlin v. Beller.....	Christie v. Gage.....	84
Chambers v. Appleton.....	Christie v. Herrick.....	177
Chambers v. Clearwater...13,	Christiensen v. Eno.....	101
Chambers v. Durand.....	Christy v. Perkins.....	375
Chambers v. Lewis.....	Chryslin, <i>ex parte</i>	788
Chamboret v. Cagney.....	Chubbuck v. Morrison.....	513
Champion v. Webster.....	Church v. Van Buren.....	122
Champlin v. Deitz.....	Church v. United Ins. Co....	278
Chandler v. City of Fon du	Churchill v. Onderdonk....	179
Lac	Ciancimono &c. Co. v. Cian-	
Chandler v. Stevens.....	cimono.....	592
Chapin v. Foster.....	Citizens' Bk. v. Wilder....	711
Chapin v. Pratt.....	Citizens' Nat. Bk. v. Shaw...	
Chapin v. Seeley.....		721, 783
Chapin v. Thompson.....	Citizens' Natl. Bk. v. Vorhis..	484
Chapin v. Townsend.....	City of Buffalo, Matter of..	797, 802
Chapman v. City of Rochester	City of Rochester v. Bronson.	736
Chapman v. Douglas.....	City of Schenectady v. Fur-	
Chapman v. Fonda.....	man	440
Chapman v. Forbes.....	City Natl. Bk. v. Natl. Park	
Chapman v. Lynch.....	Bk.	449
Chapman v. Wilber.....	Clady v. Wood.....	236
Chappell v. Potter.....	Clafin v. Du Bois.....	289
Chase v. Behrman.....	Clafin v. Frenkel.....	488
Chase v. Edwards.....	Clafin v. Gordon.....	160, 161
Chase v. Lawson.....	Clafin v. Houseman.....	55
Chase v. Lord.....	Clapp v. Clapp.....	725
Chase v. Vanderbilt.....	Clapp v. Graves.....	278, 778
Chatham Natl. Bk. v. Mer-	Clapp v. McCabe.....	419
chant's Natl. Bk.....	Clapp v. Schutt.....	535
Chauncey v. Lawrence.....	Clapp v. Town of Ellington..	164
Chautauqua Co. Bk. v. Risley.	Clare v. Lockard....	120, 216, 628
Chautauqua Co. Bk. v. White.	Clare v. National City Bank..	348
707		

Clark v. Binninger.....	725	Clyde v. Rogers.....	833, 840, 847
Clark v. Brooks.....	263	Coates v. Coates.....	604
Clark v. Clark.....	383	Coates v. Goddard.....	773
Clark v. Coles.....	414	Coatsworth v. Lehigh Val. R.	
Clark v. Dillon.....	320, 347, 425, 430	R. Co.	348
Clark v. Goodridge.....	652	Cockerill v. Loonam.....	454
Clark v. Grant.....	202, 503	Cockey v. Hurd.....	262
Clark v. Gray.....	761	Coffin v. Lester.....	786
Clark v. Hall.....	786	Coffin v. Pros. Park & C. I. R.	
Clark v. Havens.....	243	R. Co.	606
Clark v. King & Bro. Pub. Co.		Coffin v. Stitt.....	680
585, 586		Cohen v. Hymes.....	106
Clark v. Lynch.....	656	Cohen, Matter of.....	45
Clark, Matter of.....	96, 830	Cohen v. Ratkowsky.....	244
Clark v. McFarland.....	287	Cohn v. Baldwin.....	356
Clark v. Mosher.....	313	Cohn v. Bonst.....	147
Clark v. Poor.....	477	Coit v. Beard.....	316
Clark v. Titcomb.....	159	Coit v. Campbell.....	814, 815
Clark v. Van Amburgh.....	115	Coit v. Stewart.....	448
Clark v. Van Deusen.....	467	Cole v. McClellan.....	38, 503
Clark v. Village of Dunkirk..	573	Cole v. McGarvey.....	186
Clark v. Warren.....	652	Cole v. Reynolds.....	143
Clarke v. Boreel.....	222	Coleman v. Bean.....	642, 686
Clarke v. Gibbons.....	84	Coleman, Matter of.....	52
Clarke v. Miller.....	777, 782	Coleman v. Phelps.....	409
Clason v. Baldwin.....	168	Coleman v. Second Ave. R. R.	
Claud v. McKenzie.....	801	Co.	94
Clay v. Baker.....	339	Collins v. Campfield.....	215
Cleaurant v. Maillard.....	418	Collins v. Coggill.....	382
Clegg v. Am. Newspaper Union	355	Collins v. Collins.....	485
Clement v. Beale.....	370	Collins v. Jewell.....	815
Clerk's Fees, Matter of.....	19	Collins, Matter of.....	124
Cleveland v. Barrows.....	409	Collins v. Robinson.....	54
Cleveland v. Hatch.....	350	Collins v. Ryan.....	216
Clews v. Rockford, R. I. & St.		Colorado St. Bk. v. Gallagher.	59
L. R. R. Co.....	209, 615	Colrick v. Swinburne.....	359, 421
Clickman v. Clickman.....	264, 787	Colton v. Jones.....	408
Clifford v. Dam.....	435	Columbian Ins. Co. v. Stevens	723
Clifton v. Brown.....	362, 364	Col. Ins. Co. v. Force.....	212, 517
Climax Specialty Co. v. Smith	342	Colwell v. Cudlam.....	352
Clinch v. Southside R. R. Co.	729	Colt v. Davis.....	307
Clinton v. Eddy.....	117, 440, 460	Com'l. Bk. v. Foltz.....	38
Clinton v. King.....	234	Com'l. Bk., Matter of.....	132
Clinton Liberal Inst. v.		Com'l. Bk. v. Pfeiffer.....	332
Fletcher	550	Com. Bk. of Albany v. Dun-	
Close v. Gillespie.....	18, 778	ham	835
Clussman v. Markel.....	40	Com'l. Tel. Co. v. Smith.....	49
Clute v. Voris.....	166	Com. Warehouse Co. v. Graber	529

Compton v. Bowns.....	116	Corbin v. Knapp.....	375
Compton v. "The Chelsea"...	408	Corcoran v. Mannering.....	413
Comstock v. Hoeft.....	397	Cordier v. Thompson.....	395
Conaughty v. Nichols.....	320	Corey v. Long...704, 717, 719, 721	
Conklin v. Dutcher.....	510	Corkings v. State...103, 112, 116	
Conklin v. Woodbury Institute	436	Cormier v. Hawkins.....	484
Conkling v. Gandall.....	329	Cornell v. Dakin.....	435
Conn. Nat. Bk. v. Bayles....	293	Cornell v. Funk.....	650
Conn. Tr. Co. v. Wead.....	105	Cornell v. King.....	543
Connelly v. Krets.....	726	Cornell v. Woolsey.....	841
Connolly v. Hyams.....	774	Corn Ex. Bk. v. Blye.....	
Consalus, Matter of.....	151	510, 799, 801, 802	
Considerant v. Brisbane.....	159	Corning v. McCullough.....	94
Continental Nat. Bk. v. Myer		Corning v. Roosevelt.....	468
Co.	841	Corning v. Slosson.....	14
Continental Nat. Bk. v. Thur-		Corning v. Southland.....	40
ber	215	Corning v. Troy Iron & Nail	
Continental Nat. Bk. v. U. S.		Factory	539, 580
Book Co.	215	Cornwall v. Cornwall....	367, 375
Continental Store S. Co. v.		Corson v. Ball.....	615
Clark	58, 546, 572, 585	Corwin v. Freeland.....	505
Cook v. Chase.....	468	Cosgrove v. Bowe.....	531
Cook v. Dickerson.....	596	Cossitt v. Winchell.....	626, 627
Cook v. Litchfield.....	470	Costello v. Downer.....	105
Cook v. Ritter.....	41	Coster v. Greenpoint Ferry Co.	48
Cook v. Staats.....	252	Coster v. Phoenix.....	794
Cook v. State Nat'l. Bank....	56	Cothran v. Hanover Nat'l. Bk.	374
Cook v. Thurston.....	122	Cottrell v. Finlayson.....	34
Cook v. Warren....	321, 348, 379	Couch v. Mulhane.....	232
Cook v. Whipple.....	55, 56	Coughlin v. N. Y. C. & H. R.	
Cooke v. Appleton.....	613	R. R. Co.....	37, 45, 46
Cooke v. Lalance Grojean		Coulter v. Murray.....	566
Mfg. Co.	834	Coursen v. Hamlin.....	764, 765
Coon v. Knapp.....	797	Courtney v. Eighth Ward Bk.	654
Cooney v. Whitfield.....	639	Covell v. Hart.....	40
Cooper v. Bissell.....	793	Coveney v. Tannahill.....	54
Cooper v. Burr.....	394	Cowdin v. Cram.....	497
Cooper v. First Pres. Ch....	552	Cowenhoven v. City of Brook-	
Cooper v. Fiske.....	390	lyn	419
Cooper v. Jones.....	361	Cowper v. Theall.....	561
Cooper v. Kipp.....	445	Cox v. N. Y. C. & H. R. R.	
Cooper, Matter of.....	804	R. Co.	40, 813
Cooper v. Newland.....	175	Cox v. Parry.....	760
Corbet v. Brown.....	22	Coykendall v. Hood.....	568
Corbett v. De Comean.....	39	Cozine v. Walter.....	536
Corbett v. Gibson.....	39	Cragin v. Lovell...58, 332, 441, 472	
Corbett v. 23d St. Ry. Co....	813	Craig v. Roch. City & Brigh-	
Corbin v. Casina Land Co....	281	ton R. R. Co.....	556

Cram v. Moore.....	834	Cummings v. Wooley.....	507
Crandall v. Beach.....	181	Cummins v. Barkalow.....	159
Crandall v. Bryan.....	488, 507	Cunard S. S. Co. v. Voorhis..	544
Crandall v. Moston.....	115	Cunningham v. Pell.....	147, 148
Crane v. Crofoot.....	264	Cunningham v. Von Pustran.	616
Crane v. McDonald.....	310	Cunningham v. Widing.....	44
Crane, Matter of.....	274	Currey v. Bowker.....	801
Crane v. Powell.....	435	Currie v. Currie.....	440
Cranford v. Tyrrell.....	565, 578	Currie v. Reilly.....	641
Crary v. Goodman.....	88	Curtis v. Green.....	248
Crary, Matter of.....	658, 659	Curtis v. Hitchcock.....	242, 243
Crawford v. Castner.....	563	Curtis v. Kimball.....	25
Cream City Furniture Co. v. Squier	260, 787	Cushing v. Family Fund Soc.	70
Creed v. Hartman.....	164	Cushing v. Ruslander.....	586
Cregin v. Brooklyn C. T. R. R. Co.	13, 818	Cushman v. Reynolds.....	363
Cridler v. Curry.....	163	Cutler v. James Gould Co.	646, 755
Crippin v. Culver.....	133	Cutler v. Wright.....	467, 480
Crocker v. Baker.....	586	Cutter v. Pool.....	832, 842
Crocker v. Manhattan Life Ins. Co.	577	Cutter v. Rathbone.....	781, 789
Croghan v. Livingston....	187, 789	Cutting v. Damerel.....	719
Cromwell v. Van Rensselaer..	257	Cutting, Matter of.....	183
Cronin v. Crooks.....	514, 621, 638, 643		
Cronin v. O'Reilly.....	20		
Cronin v. Tebo.....	764		
Cronkhite v. Cronkhite....	555, 556		
Crook v. Crook.....	288		
Crook v. Jewett.....	488		
Crooke v. Anderson.....	180		
Crosier v. Cornell St. Bt. Co.	259		
Croton Ins. Co., Matter of...	745		
Croty v. McKenzie.....	47		
Crounse v. Syr. Chen. & N. Y. R. R. Co.....	605		
Crouch v. Hoyt.....	87		
Crouse v. Paddock.....	536		
Crouter v. Crouter.....			
	184, 187, 222, 231		
Crow v. Gleason.....	116		
Crowns v. Vail.....	637		
Cruger v. Hudson R. R. Co.	347		
Cruikshank v. Cruikshank...	793		
Cruikshank v. Goodwin.....	43		
Cumming v. Brown.....	100		
Cumming v. Egerton.....	130, 718, 722		
Cummings v. Morris.....	145		

D.

Dainese v. Allen.....	559
Dailey v. Dailey.....	768
Dakin, Matter of.....	34
Dakin v. Dunning....	759, 761, 762
Dake v. Miller.....	232
Dale v. Gilbert.....	789
Dalrymple v. Williams.....	794
Dalton v. Sandland.....	816
Daly v. Burchell.....	176
Daly v. Smith.....	570
Dalzell v. Fahys Watch Case Co.	841
Dambman v. Schulting.....	470
Danaher v. City of Brooklyn.	416
Danforth v. Culver.....	114
Daniel v. Daniel.....	355
Dannenbaum v. Mandelbaum.	509
Darragh v. McKim.....	247
Darling v. Pierce.....	13
Darrow v. Calkins.....	184
Darrow v. Miller.....	380
Davidson v. Chatham Nat. Bk.	663
Davidson v. Seligman.....	390
Davies v. Davies.....	171

Davis v. American Soc., etc.. 568, 577	DeFreest v. Warner..... 115
Davis v. Ainsworth..... 668	Degener v. Stiles..... 707
Davis v. Bowe..... 41	DeGraw v. Elmore..... 370
Davis v. Brooks..... 639	DeGroot v. Jay..... 131
Davis v. Cornue..... 559	Dehn v. Mandeville..... 338
Davis v. Duffie..... 203	Delafield v. Illinois..... 55, 56
Davis v. Dunham..... 834	Delafield v. Ormsby Co..... 636
Davis v. Hoppock..... 321, 427	Delahunty, Matter of.... 133, 199
Davis v. Mayor, etc.. 155, 553, 590	DeLancy v. Piepgros..... 281
Davis v. Noyes..... 115	DeLancy v. Murphy..... 309
Davis v. N. Y., L. E. & W, R. R. Co..... 369	Delaney v. Miller..... 450
Davis v. Rich..... 253	DeLavalette v. Wendt..... 441
Davis v. Richards..... 827	Delisser v. N. Y., N. H. & H. R. R. Co..... 197
Davis v. Rosenstein..... 611	DeLisle v. Hunt..... 812
Davis v. Solomon..... 43	DeMelt v. Leonard..... 283
Davis v. Stover..... 452	Deming v. N. Y. Marble Co.. 715
Davis v. Zimmerman... 577, 608	Dempsey v. Lepp..... 485
Davison v. Baker..... 200	Denman v. McGuire..... 656
Davison v. Powell..... 393	Denike v. Denike..... 301
Dauchy v. Miller..... 262, 263	Denike v. N. Y. &c. Lime Co.. 702, 732
Daus v. Nussberger..... 135	Denise v. Swett..... 58
Dawley v. Brown..... 470	Dennison v. Dennison.... 428, 430
Dawson v. American Surety Co. 562	Dennison v. Plumb..... 100
Dawson v. Bogart..... 362	Denniston v. Trimmer..... 448
Day v. Bach..... 683	Denny v. Smith..... 105
Day v. Mayor, etc..... 25	DeNobele v. Lee..... 328
Dayton v. Wilkes..... 572	Denton v. Noyes..... 42
Dean v. Biggs..... 744	Depeyster v. Warne.... 257, 803
Dean v. Eldridge..... 123	DePuy v. Strong..... 162, 462
Dean v. Gilbert..... 366	Derby v. Yale..... 161
Dean v. Hewitt..... 117	Derham v. Lee..... 334
Dean v. Roseboom..... 151	DeRidder v. Schermerhorn.. 163
DeBemer v. Drew..... 210	DeSilver v. Holden..... 409, 523
DeBerard v. Price..... 600	Deutermann v. Pollock..... 251
DeBost v. Albert Palmer Co.. 823	Devlin v. Hope..... 271, 457, 702
DeCaters v. DeChaumont.... 795	Devlin v. Mayor..... 41
Decatur v. Goodrich..... 492	Devlin v. Roussel..... 220
Decaumont v. Morgan..... 116	Devoe v. Ithaca & Owego R. R. Co. 736
Decker v. Gardner... 704, 716, 727	Deyo v. Morss..... 365, 367
Decker v. Kitchen..... 277, 379, 480, 799, 802, 803	DeWeerth v. Feldner..... 508
Decker v. Mathews..... 322	DeWick v. Dobson..... 577
De Crano v. Moore..... 414	Dewey v. Hoag..... 456
Deering v. Riley..... 167	DeWitt v. Chandler..... 147
DeForest v. Baker..... 384	DeWitt v. Van Schoyk..... 557
	DeWolfe v. Abraham.... 407, 411

Dezengremel v. Dezengremel.	434	Donadi v. N. Y. S. Mut. Ins. Co.	206
Diamond v. Williamsburg Ins. Co.	365, 366	Donnell v. Williams	627
Diamond Match Co. v. Roeber	548	Donnelly v. City of Brooklyn	91
Dias v. Merle.....	848	Donnelly v. Woolsey.....	73
Diblee v. Mason.....	194, 781	Donohoe v. Hungerford.....	43
Dick v. Phillips....	833, 842, 845	Donohoe v. Pomeroy.....	358
Dickinson v. Benham.....	675	Donzone & Co. v. Caneppla....	700
Dickinson v. Mayor.....	99	Doolittle v. Doolittle.....	24
Didier v. Warner.....	426	Doolittle v. Supervisors.....	553
Didsbury v. Van Tassell....	6, 203	Doolittle v. Tice.....	83
Diederich v. Richley.....	802	Doolittle v. Ward.....	289
Dieckerhoff v. Ahlborn.....	532	Dorlon v. Lewis.....	44
Diefendorf v. Diefendorf.....	179	Doty v. Mich. Cen. R. R. Co..	206
Diefendorf v. House.....	38	Doty v. Russell.....	246, 802
Diefenthaler v. Mayor.....	94	Douglas v. Delano.....	834, 847
Dieffenbach v. Roch.....	91	Douglas v. Douglas.....	777
Dietz v. Farish.....	797	Douglas v. Haberstro.....	
Dillingham v. Varron.....	233		232, 534, 538, 781
Dillon v. Sixth Ave. R. R. Co.	457	Douglas v. Seiferd.....	293
Dimick v. Cooley.....	49	Douglass v. Wiggins.....	578
Dinan v. Allen.....	643	Douoy v. Hoyt.....	290
Dinan v. Coney. 442, 449, 459,	478	Dovan v. Dinsmore.....	321, 385
Dinkespiel v. Levy.....	792	Dowdney v. Volkening.....	352
Dinsmore v. A. & P. R. Co..	148	Downs v. Farley.....	135, 136
Dinsmore v. Adams.....	803	Dows v. Green.....	365
Dinsmore v. The Board of Police	568	Doyle v. Man. El. R. R. Co..	85
Dinsmore v. Neresheiner....	559	Doyle v. O'Farrell.....	316
Disbro v. Disbro.....	582, 599	Drake v. Hud. R. R. R. Co..	582
Divine v. Duncan.....	375	Drake v. N. Y. Iron Mine Co..	
Dixon v. Beach.....	519		39, 786, 790
Dodge v. Colby.....	58, 407, 415	Drake v. Satterlee.....	465
Dodge v. Lambert.....	554	Drake v. Weinman & Co....	835
Dodge v. Porter.....	666	Draper v. Beers.....	506
Dodge v. St. John.....	303	Dreyfus v. Otis.....	506, 507
Dodge & Stevenson Mfg. Co., Matter of	13, 14	Drevert v. Appsert.....	341
Dodge v. Weil.....	359	Dry Dock E. B'way. & Batt. R. Co. v. Cunningham.....	598
Doellner v. Tynan.....	565	Dubois v. Beaver.....	324
Doheney v. Lacy.....	54	Dubois v. Cassidy.....	171
Doherty v. Matsell.....	817	Dubois v. D. & H. C. Co....	359
Doherty v. Shields.....	320	Dubois v. Hermance.....	435
Dolan v. Petty.....	764, 765	Dubois v. Thompson.....	492
Dolbeer v. Stout.....	459	DuBois v. Un. Dime Sav. Inst.	312
Dollfus v. Frosch.....	271	Dudley v. Broadway Ins. Co..	
Dominy v. Miller.....	86		367, 368
		Dudley v. Mayhew.....	58

Duff v. Hutchinson..	836, 838, 841	Eagan v. Moore.....	771, 783
Duff v. Russell.....	579	Eagle v. Underhill.....	124
Duffy v. Brady.....	343	Eagle Iron Works, In Re..	698, 702
Duffy v. Casey.....	720	Eagleston v. Son.....	394
Duffy v. O'Donovan.....	756	Earl v. David.....	124, 476
Duke of Brunswick v. King of Hanover	57	Earle v. Beman.....	839, 840
Dumond v. Church.....	178	Earle v. Earle.....	158, 291, 301
Duncan v. Ainslie.....	767	Earle v. Scott.....	406, 472
Duncan v. Berlin.....	654	Easterbrook v. Easterbrook...	221
Duncan v. Guest.....	752	Eastman v. Kelly.....	53
Duncan v. Katen.....	499	Eastman v. Starr.....	595
Duncan v. Ray.....	360	East River Bk. v. Cutting....	130
Dunford v. Weaver.....	200	Easton v. Cassidy.....	484
Dunham v. Bower.....	445	Easton v. Malavazi.....	620, 640
Dunham v. Cressy.....	201	Eaton v. Alger.....	163
Dunham v. Dodge.....	116	Eaton v. Balcam.....	471
Dunham v. Fitch.....	133	Fbbinghousen v. Worth Club.	146
Dunham v. Hastings Pavement Co.	435	Eberhart v. Schuster.....	50
Dunkirk v. L. S. & M. S. R. R. Co.	385	Eberle v. Krebs.....	261
Dunlap v. Commercial Ins. Co.	760	Eckerson v. Village of Haver- straw	162
Dunlop v. Patterson F. Ins. Co. 647, 648, 657, 716		Eckert v. Belden.....	487
Dunn v. Acker, etc.....	664	Eckert v. Gallien.....	449, 478
Dunn v. Arkenburgh....	661, 664	Eckstein v. Frank.....	500
Dunn v. Dunn.....	200	Edick v. Green.....	631, 635
Dunn v. Mason.....	305	Edison Elec. Illum. Co., Mat- ter of	76
Dunne v. Am. Surety Co....	127	Edmonston v. McLoud.....	591
Dunning v. Bank of Auburn..	306	Edmunds v. Barton.....	22
Dunning v. Humphrey.....	755	Edwards v. Downs.....	334
Dupigniac v. Van Buskirk....	307	Egan v. Rooney.....	43
Duprat v. Havemeyer.....	386	Egan v. Walsh.....	706
Durant v. Gardner.....	420	Ehle v. Haller.....	333
Duryea, Watts & Co. v. Rayner	632	Eidlitz v. Rothschild.....	460
Dusenbury v. Dusenbury..	418, 710	Eighmie v. Taylor.....	365
Dusenbury v. Keiley.....	114	Elder v. Bogardus.....	152, 847
Duyckinek v. N. Y. Elev. R. R. Co.	362	Elder v. Morrison.....	23
Dwight v. Germania L. Ins. Co.	353, 356, 358, 360	Eldridge v. Howell.....	789
Dwinelle v. Eddy.....	93	Eldridge, Matter of....	30, 31, 32
Dyett v. Seymour.....	355	Electrical Power Storage Co. v. Whiting	542
		Eleventh Ward Bk. v. Powers 225, 235, 236	
		Eleventh Ward Sav. Bk. v. Hay	306
		Elliot v. Kennedy.....	288, 294
E, Matter of.....	31	Ellis v. Van Ness.....	295
Eads v. Wynne.....	782	Ellson v. Hance.....	489

E.

Ellsworth v. Brown.....	315	Excelsior Co. v. Cosmopolitan	
Ellsworth v. Scott.....	684	Co.	659
Elwell v. Russell.....	494	Exchange F. Ins. Co. v. Norris	757
Elwood v. Diefendorf.....	113		
Ely v. Mumford.....	508		
Emerson v. A. & O. L. R. R.		F.	
Co.	205, 206	Fairbanks v. Blaut.....	430
Emery v. Baltz.....	427	Fairchild v. O. C. & R. Ry. Co.	427
Emigrant Ind. Sav. Bk. v.		Fairweather v. Satterly.....	188
Goldman	176	Falconer v. Ucoppell.....	289
Emmeleuth v. H. B. Assoc....	162	Fales v. Hicks.....	381
Emmons v. McMillan Co....	386	Fallon v. Durant.....	429, 460, 478, 479
Empire Feed Co. v. Chatham		Fallon v. Egberts Woolen Mill	
Nat'l. Bk.	444	Co.	723
Engel v. Kuche.....	543	Fanning v. Osborne.....	556
Engelhardt Co. v. Benjamin..		Fargo v. Owen.....	159
	494, 506	Farish v. Austin.....	122
English v. Furniss.....	371	Farmer v. Nat. Life Assn. of	
Ennis v. Curry.....	50	Hartford	210, 231, 234
Enos v. Leach.....	471	Farmer v. Robbins.....	203, 504, 515
Enos v. Thomas.....	406	Farmers' Bank v. Blair.....	164
Equitable L. Ass. Soc. v. Cuy-		Farmers' L. & T. Co. v. Dick-	
ler	350, 454, 458	son	211, 524, 780
Equitable L. Ins. Co. v. Stev-		Farmers' L. & T. Co. v. Hotel	
ens	124	Brunswick Co.	700
Erickson v. Poey.....	136	Farmers' L. & T. Co. v. Mer.	
Erickson v. Quinn.....	96	Tel. Co.	738
Erie Ry. Co. v. Gould.....	262	Farmers' L. & T. Co. v. Reid..	
Erie Ry. Co. v. Ramsey....	558, 590		188, 805
Erisman v. Pidcock.....	248	Farmers' Nat'l. Bk. v. Wil-	
Ervin v. Oregon Ry. & Nav.		liams	182
Co.	231, 835	Farmers' & Cts.' Bk. v. Sher-	
Ervin v. Oregon Steam Nav.		man	390
Co.	203	Farnam v. Barnum.....	160
Erwin v. Hurd.....	552, 555	Farnsworth v. Wilson.....	389
Evans v. Backer.....	283, 284	Farnsworth v. Wood.....	149
Evans v. Harris.....	37	Farquhar v. Wisc. Cond. Milk	
Evans v. Holmes.....	518	Co.	612
Evansville Nat'l. Bk. v. Kauf-		Farrand v. Marshall.....	556
mann	145	Farrell v. Amberg.....	347, 458
Everett v. Everett.....	220	Farrington v. Birdsall....	589, 590
Everitt v. Park.....	637, 639	Farrington v. Freeman.....	595
Everson v. Gehrman.....	770	Fassett v. Tallmadge.....	723
Ewart v. Schwartz.....	484	Faulk v. Kamp.....	389
E. W. Bliss Co. v. Opera Glass		Fawcett v. Vary.....	260, 783
Supply Co.	635	Fay v. Hebbard.....	35, 42
Ewing v. Johnson.....	591	Fellerman v. Dolan.....	443

Fellows v. Fellows.....	589	First Ref. Pr. Ch. v. Bowden	
Fellows v. Heermans.....	541, 702, 712		161, 552
Fenn v. Bolles.....	699	Fischer-Hansen v. Bklyn. Hgts.	
Fera v. Wickham.....	450	R. R. Co.....	49
Ferdon v. Ferdon.....	34	Fish v. Hose.....	464, 475
Ferguson v. C. Rubber Co....	263	Fish v. Ferris.....	399
Ferguson v. Crawford.....	43, 232, 800	Fisher v. Charter Oak L. Ins.	
Ferguson, Matter of.....	34	Co.	469, 475
Ferguson v. Neilson.....	57	Fisher v. Dougherty.....	678
Fern v. Vanderbilt.....	396	Fisher v. Gould.....	276, 480
Ferrin v. Myrick.....	152	Fisher v. Lyon.....	187
Ferriss v. N. A. F. Ins. Co....	472	Fisher v. Nash.....	626
Ferris v. Plummer....	216, 238, 629	Fisk v. Chicago, etc., R. R. Co.	262
Fetes v. Volmer.....	222	Fisk v. Spring.....	668
Fetridge v. Merchant.....	575	Fiske v. Anderson.....	227
Fetridge v. Wells.....	575	Fiske v. Bennett.....	216
Fettretch v. McKay.....	379, 455	Fiske v. Hibbard.....	115
Field v. Gibson.....	150	Fitch v. Bigelow.....	344
Field, Matter of.....	224	Fitzgerald v. Blake.....	240, 666
Field v. Ripley.....	704	Fitzsimons v. Drought.....	244
Field v. Van Cott.....	163	Flandrow v. Hammond.....	156
Fielden v. Carelli.....	480	Flandrow, Matter of.....	648, 653
Fielding v. Lucas.....	558	Fleet v. Cronin.....	841
Fields v. Bland.....	487	Fleischmann v. Bennett.....	
Filer, Matter of.....	298		330, 373, 464
Filer v. N. Y. C. R. R. Co....	404	Fleischmann v. Stern.....	349, 432
Finch v. Carpenter.....	122, 123	Fletcher v. Daniels.....	115
Finch v. Galligher.....	202	Fletcher v. Krupp.....	707, 711
Finck v. Police Com'rs.....	543	Flood v. Van Wormer.....	568
Fincke v. Funke.....	716	Florence v. Bulkley.....	136
Finelite v. Finelite.....	280	Flynn v. Hudson R. R. Co.	206
Fink v. Jetter.....	354	Flynn v. Taylor.....	186
Fink v. Justh.....	439	Fogg v. Edwards.....	363
Finlay v. Castroverde.....	507	Foley, Matter of.....	647
Finlay v. Chapman.....	833, 837	Follett v. Jewett.....	396
Finlay v. Leary.....	45	Folsom v. Marsh.....	571
Finnegan v. Carraher.....	169	Foot v. Bronson.....	162
First Nat. Bk. v. Bushwick,		Foot v. Farrington.....	95
etc.	629	Foot v. Harris.....	215
First Nat. Bk. v. Heaton.....	797	Foot v. Morgan.....	13
First Nat. Bk. v. Ranger.....	295	Foot v. Stiles.....	12, 13
First Nat. Bk. v. Shuler....	142	Foot v. Lathrop.....	203
First Nat. Bk. v. Washburn..	723	Forbell v. City of N. Y.....	580
First Nat. Bk. of Jersey City		Forbes v. Garfield.....	117
v. Lenk	811, 820	Forbes v. Whitlock.....	147
First Nat. Bk. of Utica v. Bal-		Ford v. Belmont.....	178
lou	116	Ford v. Ford.....	73

Ford v. Leche.....	22	Frets v. Frets.....	397
Forrest v. Forrest.....	497, 569	Freund v. Washburn.....	184
Forster, Matter of.....	33, 34	Frick v. White.....	450
Forsyth v. Edmiston.....	408	Friedsman, Matter of.....	33
Fort Plain Bldg. Co. v. Smith		Friend v. Michaelis.....	623
	180, 556	Frisbie v. Young.....	203, 502
Forty-second St. R. R. Co. v.		Fromme v. Lisner.....	845
Thirty-fourth St. R. R. Co.		Frothingham v. Broadway,	
	564, 565	etc., R. R. Co.....	835, 839
Fosdick v. Groff.....	432	Fruin-Bambrick Cons. Co. v.	
Foster v. Townsend.....	130, 131	Marks	354
Foster v. Townshend.....	30, 716, 720	Fry v. Bennett.....	
Fosgate v. Herkimer Mfg. Co.	169		319, 330, 350, 427, 438, 470
Foster v. City of Buffalo....	556	Fullan v. Hooper.....	562
Foster v. Devlin.....	765	Fuller, Matter of.....	800
Foster v. Foster.....	171	Fuller v. Roosevelt.....	359
Foster v. Moore.....	222	Fuller v. Scribner.....	241
Foster v. Wilkinson.....	54	Fuller v. Sweet.....	316
Fowler v. Burns.....	586	Furber v. McCarthy.....	450
Fowler v. Callan.....	36, 37, 45	Furbush v. Nye.....	57
Fowler v. Huber.....	272	Furman v. Walter.....	614, 640
Fowler v. Van Surdam.....	98	Fulton F. Ins. Co. v. Baldwin	466
Fowler's Petition.....	836		
Fox v. Davidson.....	329		
Fox v. Fee.....	187		
Fox v. Fitzsimons.....	576		
Fox v. Fox.....	47		
Fox v. Mays.....	677		
Francis v. Shoellkopf.....	180		
Francis v. Sitts.....	290		
Frank Brewing Co. v. Ham-			
mersen	460		
Frankel v. Elias.....	98		
Frankel v. Hays.....	634		
Franklin Bank Note Co. v.			
Mackay	792		
Frazer v. Phelps.....	845		
Fredericks v. Mayer.....	570		
Fredericks v. Taylor.....	337, 338, 346		
Freeman v. Dutcher.....	122, 123, 476		
Freeman v. Falconer.....	145		
Freeman v. Frank.....	437		
Freer v. Denton.....	332, 407		
Frees v. Ford.....	397, 469		
French v. Board of Education	569		
French v. Dauchy.....	714		
French v. Merrill.....	64		
French v. Salter.....	410		

G.

G. V. R. R. Co. v. Slaight....	83
Gabriel v. Schillinger Co....	34
Gadsden v. Woodward.....	338
Gaffney v. Bigelow.....	228, 288
Gailliard v. Smart.....	40
Gale, Matter of.....	32
Gale v. Vernon.....	280
Gallagher v. Karns.....	705
Gallagher v. Merrill.....	429
Gallatin v. Oriental Bk.....	544
Galle v. Tode.....	54
Gallie v. Eagle.....	170, 622
Galloway, Matter of.....	618
Gallt v. Finch.....	278, 293
Gallup v. Bernd.....	101
Galusha v. Flower City Nat.	
Bk.	608
Galway v. Metro. Ele. Co....	85
Galway v. U. S. Steam Sugar	
Ref. Co.....	560, 732
Gannon v. Myars.....	464
Gansevoort v. Gilliland.....	793
Garbutt v. Hanff.....	675

Garden v. Garden.....	720	German Sav. Bk. v. Carrington	122
Garden v. Sabey.....	666	German Sav. Bk. v. Muller...	176
Gardiner v. Gardiner.....	485	Gerstein v. Fischer.....	373
Gardinier v. Knox.....	355	Getty v. Hud. River R. R. Co.	361, 406
Gardner v. Clark.....	436	Getty v. Spaulding.....	822
Gardner v. Gardner.....	116, 611	Gibbs v. Hichborn.....	492
Gardner v. Kraft.....	181, 395	Gibbs v. Queen Ins. Co.....	208
Gardner v. Locke.....	389	Gibson v. Gibson.....	387
Gardner v. Ogden.....	57	Gibson v. Nat. Park Bk.....	649, 654, 655, 656
Gardner v. Walker.....	820	Gilbert v. Morrison.....	115
Garland, <i>Ex parte</i>	29, 131	Gilbert v. Pritchard.....	404
Garner v. Harmony Mills....	410	Gilbert v. Rounds.....	427
Garner v. Wright.....	159	Gilbert v. York.....	469
Garr v. Bright.....	155	Gilchrist v. Gilchrist.....	366, 376, 778
Garretson v. Weaver.....	707	Gildersleeve v. Landon.....	350
Garrison v. Garrison.....	770	Giles v. Caines.....	801
Garson v. Brumberg.....	638, 643	Gill v. Ætna Live Stock Co..	372
Garvey v. L. I. R. R. Co....	576	Gillen v. Canary.....	71, 306
Garvey v. Union Trust Co....	172	Gillespie v. Forrest.....	162
Garwood v. N. Y. C. & H. R. R. R. Co.	579	Gillespie, Matter of v. Mulhol-land	34
Gasherie v. Appel.....	622	Gillet v. Borden.....	474
Gaspar v. Adams.....	320, 778	Gillet v. Fairchild.....	744
Gastine v. Stoddard.....	113	Gillet v. Moody.....	744
Gates v. Andrews.....	95	Gillian v. Norton.....	555
Gates v. Guthrie.....	288	Gillig v. Treadwell Co....	656, 689
Gates, Matter of.....	47	Gilman v. Prentice.....	596
Gay v. Cary.....	358	Gilmore v. Ham.....	113
Gearon v. Bk. for Savings...	42	Gilmore v. Hempstead...	345, 346
Gebhard v. Parker.....	352	Glacius v. Fogel.....	177
Gedney v. Haas.....	516	Glacken v. Brown.....	81, 166
Gee v. Chase Mfg. Co.....	354	Gladke v. Maschke.....	616
Geery v. Webster.....	470	Glaubensklee v. H. & A. Packet Co.	342
Geib v. Icard.....	257	Gleason v. Bisby.....	496
Genin v. Schwenk.....	493	Gleason v. Moen.....	440
Genin v. Tompkins.....	620, 621, 642, 788	Glen & Hall Mfg. Co. v. Hall	446, 447, 546
Gentil v. Arnaud.....	577	Glen Cove Starch Mfg. Co. v. Gotthold	659
George v. Fitzpatrick.....	192	Glens Falls Paper Co. v. White	484
Georgia Lumber Co. v. Bissell	234, 235	Glines v. Binghamton Trust Co.	701
Georgia Lumber Co. v. Strong	290	Glines v. Supreme, etc.....	276
Gere v. Gundlach.....	809		
Gere v. N. Y. C. & H. R. R. R. Co.	607		
Gerrity v. Seeger.....	274		
German Bk. of London v. Dash	622		

Glover v. Manhattan Ry. Co.	556	Graham v. Pinckney	257
Goddard v. France & Bates	53	Graham v. Powers	290
Goddard v. Medicine Co.	353	Graham v. Read	419
Godfrey v. Godfrey	679	Graham v. Scripture	122
Godfrey v. Pell	282	Grange v. Gilbert	441
Geff v. Star Printing Co.	338	Grant v. Birdsall	192
Gold v. Bissell	524	Grant v. Chester	34
Gold & Stock Tel. Co. v. Todd	548, 572	Grant v. Griswold	830
Golberg v. Utley	417	Graves v. Graham	201
Golden Gate Con. Co. v. Jackson	636	Graves v. Waite	348
Goldmark v. Magnolia Metal Co.	298	Graves v. Spier	349
Goodale v. Central Nat'l. Bk.	433	Gray v. Kendall	339, 833
Goodard v. Trenbath	49	Gray v. N. Y. & Va. Stp. Co.	148
Gooding v. Richards	86	Gray v. Rothschild	143, 518
Gooding v. McAlister	406	Gray v. Solis	653
Goodman v. Robb	385, 464, 476	Gray v. Thomas	593
Goodrich v. James	358	Grazebrook v. McCreddie	43
Goodrich v. McDonald	51	Greaves v. Gouge	148
Goodwin v. Conklin	442	Grell v. Globe, etc., Co.	311
Goodwin v. Wertheimer	405, 436	Green v. Odell	722
Goodyear v. Betts	704	Green v. Martine	816, 817
Goodyear v. Com. F. Ins. Co.	682	Green v. Squires	224
Goodyear Dental Co. v. Friselle	123	Green v. U. S. Dealers' Pro. Assn.	571
Goosen v. Goosen	460	Green v. Warren	288
Gopsill v. Decker	302	Greenbaum v. Dwyer	221
Gordon v. Fox	497	Greenfield v. Mass. Mut. L. Ins. Co.	158, 390
Gordon v. Strong	810	Greenleaf v. Mumford	642, 661
Gotendorf v. Goldschmidt	184	Greentree v. Rosenstock	653, 654
Gould v. Glass	347, 474	Greenwood v. Marvin	801
Gould v. Mortimer	800	Gregory v. Gregory	543, 704, 710
Gould v. Root	267, 279	Gregory v. Levy	536
Gould v. Sherman	508	Grevell v. Whiteman	616
Gould v. Spencer	5	Gribbon v. Freel	628, 779
Goulding v. Bain	705	Gridley v. Gridley	356, 406
Govin v. Miranda	355	Griffin v. Barton	255
Gowdy v. Poullain	367, 778	Griffin v. Griffin	97
Gowtry v. Doane	336	Griffin v. Long I. R. R. Co.	431, 433
Graeffe v. Currie	491	Griffin v. Winne	579
Grafton v. Weeks	201	Griffiths v. DeForest	770
Graham v. Ackley	315	Griffiths v. Williams	760
Graham v. Dunnigan	478	Grimes v. Davison	508
Graham v. Harrower	435	Grimm v. Grimm	593
Graham v. Livingston	84	Grissler v. Stuyvesant	563
Graham v. People	790	Griswold, Matter of	673
		Griswold v. Stoughton	804
		Griswold v. Sweet	484, 506, 514

Groesbeeck v. Dunscomb.....	729	Hale v. Prote.....	621, 638
Groshon v. Lyon.....	470	Hall v. Bartlett.....	36
Gross v. Clark.....	279, 360	Hall v. Brennan.....	111
Gross v. Graves.....	492	Hall v. Brooks.....	660, 666
Groth v. Washburn.....	99	Hall v. Fisher.....	416
Grover v. Morris.....	98, 413	Hall v. Hall.....	418, 421
Groenstein v. Jablonsky....	429	Hall v. Holt.....	764
Grussy v. Schneider.....	756	Hall v. Huntley.....	393
Guarantee Trust, etc., Co. v. P. R. & N. E. R. R. Co.	777, 784	Hall v. Ledlie.....	667
Guardian Mut. L. Ins. Co., Matter of	745	Hall v. Olney.....	374
Guardian Sav. Inst. v. Bowl- ing Green Sav. Bank.....	721	Hall v. Sampson.....	646
Guilleman v. Rowe.....	40	Hallen v. Jones.....	511
Guman v. Allen.....	659	Hallenback v. Whitaker.....	258
Gunn v. Fellows.....	332	Hallenbarten, Matter of....	124
Gurnee v. Beach.....	322	Hallett v. Hallett.....	849
Gurney v. Sharp.....	791	Hallett v. Harrower.....	395
Gurnsey v. Powers.....	705	Hallett v. Righters.....	777
Gutbrecht v. Prospect Park & C. I. R. R. Co.....	791	Hallgarten v. Eckert.....	280
Gutta Percha Mfg. Co. v. Mayor, etc.	615	Hallock v. Scheyer.....	557
H.		Hallock v. Smith.....	177
Haberstro v. Bedford....	528, 534	Halpin v. Phenix Ins. Co.	755, 757
Habicht v. Pemberton.....	158	Halstead v. Black.....	327, 328
Hackett v. Belden.....	819	Halstead v. Cockroft....	811, 820
Hackett v. Richards.....	427	Halstead v. Dodge.....	149
Hackley v. Draper.....		Halstead v. Halstead.....	375
	132, 465, 466, 746	Hamburger v. Baker.....	233
Hackley v. Ogmun.....	437	Hamilton v. Gorman.....	825
Hadley v. Boehm.....	375	Hamilton Park Co., Matter of	552
Haebler v. Bernharth....	615, 616	Hamilton v. Penney.....	635
Haight v. Avery.....	116	Hamilton v. Royal Ins. Co..	
Haight v. Child.....	397		109, 118, 120
Haight v. Hayt.....	810	Hamilton v. Wright....	29, 39, 43
Haight v. Moore....	45, 288, 290	Hammerschlag v. Cathoscope Elec. Co.	674
Haight v. Webster.....	407	Hammond v. Earle.....	387, 431
Hailey v. Ano.....	239	Hampton v. Baylan.....	54
Haines v. Herrick.....	431	Hancock v. Hancock.....	820
Haines v. Hollister.....	471	Hand v. Burrows.....	794
Haines v. Jeroloman.....	486	Handley v. Quick.....	222
Halben v. Reilly.....	651	Hanlon v. Supervisors of West- chester	572
Halden v. Craft.....	113	Hann v. Culver.....	101
Hale v. Omaha Nat'l. Bk...		Hanover F. Ins. Co. v. Ger- mania F. Ins. Co.....	540, 698
	464, 466, 474	Hanover F. Ins. Co. v. Tomlin- son	122
		Hannover Nat. Bk. v. Stebbins	618
		Hansee v. Mead.....	434

Harbinson v. Von Volkenburgh	841	Hatch v. Ransom	506
Hardenbrook's Case	503	Hatch v. W. U. Tel. Co.	611
Harding v. Elliott	665	Hatfield v. Secor	777, 778
Harding v. Holden	22	Hatfield v. Todd	460
Hargous v. Lahens	756	Hathaway v. Brayman	646
Harker v. Mayor	323	Hathaway v. Howell	291
Harmon v. Vanderbilt Hotel Co.	400, 464	Hathaway v. Johnson	489, 498
Harold v. Hefferman	584	Hathaway v. Scott	254
Harrington v. Slade	367, 738	Hatheway v. Am. Min. Stock Ex.	206
Harris v. Bennett	302	Hathorn v. Hall	518
Harris v. Brown	272	Hatzel v. Hoffman House	458
Harris v. Clark	267	Haulenbeck v. Heacock	714
Harris v. Durkee	506, 777, 788	Haulenbeck v. McGibbon	52
Harris v. Elliott	50, 465	Hauseman v. Sterling	835, 843
Harris v. Ensign	284, 285	Havana City R. R. Co. v. Ceballos	39, 335, 350, 470
Harris v. Larkin	171	Havemeyer v. Havemeyer	378
Harris v. Mulock	756	Hawkins v. Governor	567
Harris v. Mutual L. Ins. Co.	135	Hawkins v. Pakas	272, 680
Harris v. Norvell	149	Hawksley v. Bradshaw	760
Harris v. Tumbridge	369, 371	Hawley v. Bates	789
Harris v. Warren	802	Hawley v. Davis	769
Harrower v. Heath	371	Hawley v. Mancius	561
Harrison v. Neher	272	Hawley v. Whalen	74, 111
Harrison v. Newton	564	Hayes v. Beard	519
Harry v. Hilton	42	Hay v. Hay	413
Hart v. Hart	66	Hayden v. Hayden	137
Hart v. Kennedy	503	Hayden v. Nat. Bk., etc.	652, 654
Hart v. Kip	104	Hayden v. Pierce	108, 118
Hart v. Mayor	49	Hayden v. Van Cortlandt	834
Hart v. O. & L. C. R. R. Co.	837	Haynes v. Onderdonk	190, 241
Hart v. Ten Eyck	849	Hays v. Berryman	433
Harter v. Wescott	602, 603	Hays v. Hathorn	145
Hartley v. James	339	Hayward v. Hood	376, 560
Hartt v. Harvey	552, 566	Hayward v. McDonald	416
Hartwell v. Armstrong	567	Haywood v. Thayer	296
Hartwell v. Riley	242	Hazard v. Birdsall	356
Harvey v. The Provident Sav. Soc.	362	Hazard v. Caswell	575
Harwood v. LaGrange	48, 51	Hazard v. Israel	21
Hasbrouck v. Bunce	167, 818, 820	Head v. Wollner	620
Haskin, Matter of	34	Healey, Matter of	202, 203
Hassan v. City of Rochester	573	Health Dept. v. Dassori	786
Haswell v. Lincks	216	Health Dept. of N. Y. v. Pur- don	564
Hastings v. McKinley	2, 145	Health Dept. of N. Y. v. Police Dept.	576, 584
Hatch v. Baez	57, 504	Heath v. N. Y. B. L. B. Co.	784
Hatch v. Central Nat'l. Bk.	365, 786, 797		

Hebard v. Haughian.....	53	Hess v. Hess.....	647
Hecht v. Levy.....	494	Hetzl v. Tannehill Sil. Min. Co.	306
Heckemann v. Young.....	770	Heyman v. Mittlestaedt.....	520
Hecker v. Mayor, etc.....	580	Heywood Boot, etc., Co. v. Ralph	757
Hecker v. Mitchell.....	380	Hibbard v. Randolph.....	772
Hecker v. Sexton.....	182	Hibernia Nat'l. Bk. v. La- combe	612
Hedges v. Conger.....	122	Hickey v. Yvelin.....	213
Hedges v. Payne.....	523	Hickok v. Bliss.....	105
Hees v. Nellis.....	162, 471	Hickox v. Weaver.....	38
Hees v. Snell.....	787	Hicks v. Charlick.....	848
Hegeman v. Wilson.....	595	Hicksville & C. R. R. Co. v. L. I. R. R. Co.....	440
Hegerich v. Keddie.....	802, 808, 809, 813	Hier v. Abrahams.....	574
Hegewisch v. Silver.....	130, 720, 825	Hier v. N. Y., West. Shore & Buf. R. R. Co.....	557
Heidelberg v. Kilpatrick....	453	Higenbotam v. Green.....	354
Heinmuller v. Gray.....	809, 811, 820	Higgins v. Bishop.....	847
Heli, Matter of.....	710	Higgins v. Crichton.....	406, 473
Heller v. Heller.....	199	Higgins v. Crouse.....	95
Heller, Matter of.....	132, 133	Higgins v. Freeman.....	234
Helmprecht v. Bowen.....	135	Higgins v. Healy.....	686
Hemmingway v. Poucher.....	321, 421	Higgins v. Higgins.....	101
Hempstead v. Hempstead....	335	Higgins v. Higgins Soap Co..	575
Hempstead v. N. Y. C. R. R. Co.	369	Higgins v. Mayor.....	816
Hemson v. Decker.....	420	Higgins v. McConnell.....	646
Henderson v. Jackson.....	399	High Rock, etc., Co. v. Bron- ner	342
Henderson v. Savage.....	798	Hildreth v. Carpenter.....	765
Henricus v. Englert.....	143	Hill v. Burke	302
Henriques v. Trowbridge....	380	Hill v. Gibbs.....	162
Henriques v. Yale Univ....	479	Hill v. Northrop.....	773
Henry v. Bow.....	251	Hill v. Schneider.....	565
Henry v. Randall.....	785	Hill v. Supervisors.....	108
Henry v. Salisbury.....	695	Hill v. Thacter.....	333, 339, 394
Hentz v. L. I. R. R. Co.....	545	Hill v. Warner.....	429
Hepburn v. Archer.....	841, 848	Hillebrandt, Matter of.....	34
Herbert v. Day.....	442	Hiller v. B. & M. R. R. Co.	208, 209
Herbert v. Lawrence.....	42	Hillis v. Bleckert.....	493
Herbert v. Smith.....	784	Hills v. Miller.....	555
Hergman v. Dettlebach.....	647, 666	Hilsen v. Libby.....	325
Herman v. Lyons.....	769	Hilton v. Carr.....	386
Hermann v. Aaronson.....	529	Hilton v. Sinsheimer.....	785
Herron v. Stokes.....	202	Hinck v. Desser.....	518
Hersberg v. Murray.....	794	Hinckley v. Miles.....	561
Hertz v. Stuart.....	619, 621, 637		
Hess v. Allen.....	37		
Hess v. Buff. & Niagara F. R. R. Co.....	473		

Hinman v. Borden.....	23	Holtz v. Schmidt.....	843
Hinman v. Brees.....	24	Holyoke v. Adams...373, 374, 375	
Hirschfeld v. Bopp.....	43	Home Ins. Co. v. Penn. R. R.	
Hirschfeld v. Fitzgerald...161, 822		Co.	56
Hirschfeld v. Kalischer...132, 722		Home Provident, etc., Matter	
Hitchcock v. Peterson.....	507	of	721
Hitchings v. Van Brunt.....	45	Hone v. Woolsey.....	800
Hitchman v. Baxter.....	195	Hooker v. Martin.....	176
Hoag v. Lamont.....	149	Hoorman v. Climax Cycle Co.	
Hobart v. Hobart.....	275	254, 631, 632	
Hobart College v. Fitzhugh..	158	Hope v. Acker.....	609
Hobbs v. Bashford.....	523	Hopkins v. Flynn.....	791
Hochstetter v. Isaacs.....	371	Hopkins v. Hopkins....388, 812	
Hodge v. Perine.....	578	Hopkins v. Lane.....13, 342, 461	
Hodges v. Webber.....810, 816		Hopper v. Hopper.....	150
Hodgkin v. Mead.....	793	Hopper, Matter of.....14, 133	
Hoff v. Pentz.....	352	Hoppough v. Struble.....	81
Hoffenbruth v. Miller.....	40	Hopson, Matter of.....	59
Hoffman v. Hoffman.....	367	Horne v. Montgomery.....	343
Hoffman v. N. Y., L. E. & W.		Hornfager v. Hornfager....	823
R. R. Co.....	431	Horowitz v. Olenick.....	527
Hoffman v. Tredwell.280, 821, 826		Horst v. Yuengling Brew. Co.	835
Hoffman v. Seixas.....	846	Horton v. Horton.....	435
Hoffman v. Susemihl.....	430	Hotchkiss v. Crocker...248, 393	
Hoffman v. Rowley.....	28	Hotchkiss v. Hotchkiss.....	588
Hoffman v. Van Nostrandt... 44		Hotchkiss v. Platt.....603, 604	
Hogan v. Wolf.....	94	Hotaling v. McKenzie.....	136
Hoghtaling v. Osborn.....	5	Hough v. Solmsbee.....	490
Holcomb v. Rice.....	603	Hovey v. Rubber Tip Pencil Co.	604
Holland Tr. Co. v. Cons. Gas,		Howard v. Howard.....	88
etc., Co.	700, 710	Howard v. Mich. South. R. R.	
Hollenbeck v. Clow.....	436	Co.	467
Hollenbeck v. Donnell...704, 708		Howard v. Park.....	601
Hollender v. Hall.....	201	Howard v. Prudential Ins. Co.	210
Holliday v. Parker.....	812	Howard v. Raymond.....	439
Hollingsworth v. Spectator		Howard v. Taylor.....822, 827	
Co.	465, 476	Howd v. Cole.....	438
Hollins v. St. L. & C. R. R. Co.	39	Howe v. Deuel.....	550
Hollister v. Hollister.....	327	Howe v. Elwell.....382, 429	
Holly Mfg. Co. v. Venner... 848		Howe v. Howe Mach. Co.... 574	
Holmes v. Honie.....	828	Howe v. Peckham.....	412
Holmes v. McDowell.....	714	Howe v. Roch. Iron. Mfg. Co.	576
Holmes v. Rogers.....	274	Howe Mach. Co. v. Gifford.. 310	
Holmes v. Seely.....	167	Howe Mach. Co. v. Pettibone	
Holmes v. Williams.....	782	221, 225	
Holsman v. St. John.809, 814, 815		Howell v. Adams.....	112
Holt v. Streeter.....	164	Howell v. Denniston.....257, 803	
Holthausin v. Pondir.....	54	Howell v. Leavitt.....90, 167	

Howell v. Ripley. 697, 698, 699, 700	Hunt v. Robinson. 633
Howlett v. N. Y., West Sh. & Buf. R. R. Co. 550	Hunt v. Wallis. 275, 801
Hoyt v. Am. Exchange Bk. . 849	Hunter v. H. R. I. & M. Co. . 370
Hoyt v. Campbell. 269, 270	Hunter v. LeConte. 255
Hoyt v. Carter. 786	Hunter v. Lester. 198, 799
Hoyt v. Continental Ins. Co. . 747	Huntington v. American Bk. . 761
Hoyt v. Godfrey. 494	Hurd v. Davis. 288
Hoyt v. Jackson. 52	Hurd, Matter of. 618
Hoyt, Matter of. 46	Hurlburt v. Banks. 554
Hoyt v. McKenzie. 571	Hurlburt v. Hurlburt. 54
Hoyt v. Mead. 163	Husson v. Fox. 843
Hoyt v. Putnam. 102	Husson, Matter of. 33
Hoyt v. Sheldon. 374	Hutchins v. Smith. 159
Hoyt v. Thompson. 747	Hutchinson v. N. Y. C. Mills. . 595
Hoyt v. Tuthill. 101	Hyatt v. Bates. 569
Hubbard, Matter of. 67	Hyatt v. Dusenbury. 790
Hubbard v. Otis. 358	Hyatt v. Ingalls. 58
Hubbell v. Lerch. 168, 416	Hyatt v. Swivel. 222
Hubbell v. Livingston. 333	Hyman v. Kapp. 623
Hubbell v. Medbury. . 102, 113, 157	Hyde v. Lynde. 744
Hubbell v. Merchants' Nat. Bk. 148	Hyde v. Salg. 344
Hubbell v. Sibley. 84, 92	Hygeia, etc., Co. v. N. Y. Hy- geia, etc., Co. 575
Hughes v. Chicago, M. & St. P. R. R. Co. 389	Hynes v. F. L. & T. Co. 143
Hughes v. Rathbone. 825	
Hughes v. Wood. 803	I.
Hulbert v. Clark. 92	I. P. & C. R. R. Co. v. Tyng. . 143
Hulbert Bros. Co. v. Hohman. 366	India Rubber Co. v. Rubber Comb, &c., Co. 575
Hulce v. Thompson. 545	Industrial, etc., Trust Co. v. Tod 298
Hull v. Ball. 339, 345	Ingersoll v. Mangam. 184, 199, 231
Hull v. Canandaigua Elec. Co. 198	Inslee v. Hampton. 454, 455
Hull v. Hart. 520	Ireland v. Met. Elec. Ry. Co. 377
Hull v. Spratt. 242	Ireland v. Nichols. 701
Hull v. Thomas. 591	Irwin v. Judd. 510, 788
Hultslander v. Thompson. . . 119	Isaacs v. Beth Hamedash Soc. 5
Humbert v. Trinity Ch. . . 84, 88	Iselin v. Port Royal R. R. Co. 681
Humble v. McDonough. 429	Iselin v. Rowland. 143, 145
Humphrey v. Hayes. 512	Isham v. Davison. 818
Humphreys v. Hurtt. 560	Isnard v. Caseaux. 135, 136
Humphry v. Cottleyou. 359	Israel v. Voight. 315
Hunt v. Bennett. 323	Ives v. Holden. 679
Hunt v. Brennan. 233	Ives v. Ives. 2, 41
Hunt v. Burrel. 524	Ives v. Lockwood. 658
Hunt v. Chapman. 448	Ives v. Metro. L. I. Co. 205
Hunt v. Dutcher. 328	
Hunt v. Grant. 795	

J.

J. & S. P. R. Co. v. Morley..	320	Jewell v. Schouten.....	38, 286
Jack v. Martin.....	323	Jeweller's Merc. Agency v.	
Jackling v. Edmonds.....	844	Jeweller's W. P. Co.....	549
Jackson v. Anderson.....	23	Jewett v. Pickersgill.....	315
Jackson v. Brown.....	413	Jex v. Jacobs.....	796
Jackson v. Bunnell.....	540, 581	Jex v. Mayor.....	94
Jackson v. Cains.....	90	John Church Co. v. Clarke..	443
Jackson v. City of N. Y.....	475	John S. Way Mfg. Co. v. Corn	842
Jackson v. Collins.....	23	Johnson v. Buckel...621, 638, 643	
Jackson v. Giles.....	270	Johnson v. Casey...251, 597, 609	
Jackson v. Howd.....	289	Johnson v. City of Rochester	576
Jackson v. Johnson.....	84	Johnson v. Cochrane.....	705
Jackson v. Moore.....	90	Johnson v. Columbia Ins. Co.	761
Jackson v. Parker.....	34	Johnson v. Con. Silver Min.	
Jackson v. Robins.....	90	Co.	842
Jackson v. Schaubert.....	307	Johnson v. Elwood.....	600, 813
Jackson v. Schoonmaker.....	87	Johnson v. Mallory.....	351
Jackson v. Sellick.....	84	Johnson v. Mickle.....	178
Jackson v. Smith.....	803	Johnson v. Wallace.....	150
Jackson v. Stiles.....	255	Johnson v. Whitman.....	492
Jackson v. Virgil.....	254	Johnston v. Catlin.....	774
Jackson v. Wilson.....	279	Johnston Harvester Co. v.	
Jackson v. Woodruff.....	86, 87	Meinhardt 542, 577	
Jacobs v. Hogan.....	634, 673	Johnston v. Stimmel.....	56
Jacobs v. Miller.....	252, 269	Johnston v. Winter.....	192
Jacquerson v. Van Erben.....	229	Jones v. Blum.....	737
Jacques v. Greenwood.....	333	Jones v. Brooks.....	234
Jaeger v. Bowery Bk.....	453	Jones v. Butler.....	419
Jaffray v. Brown.....	240	Jones v. Cook.....	270
Jaffray v. Nast.....	631	Jones v. Easton.....	282
Jaillard v. Tomes.....	342	Jones v. Ludlam.....	429
James v. Bennett.....	812	Jones v. McGee.....	455
James v. Richardson.....	254, 631, 639	Jones v. Newton.....	778
James v. Shea.....	316	Jones v. Palmer.....	397
Jarvis v. Palmer.....	466	Jones v. U. S. Slate Co.....	213
Jarvis v. Pike.....	459	Jordan v. Garrison.....	257
Jay's Case	722	Jordan v. Harrison.....	520
Jeffras v. McKillop & Sprague		Jordan v. Nat'l. Shoe & L.	
Co.	385	Bk.	451, 452, 461
Jenkins v. Adams.....	48	Jorgensen v. Minister of Ref.	
Jenkins v. Fahey.....	228, 378	Ch.	94
Jenkins v. Jenkins.....	709	Joyce v. Cooper.....	136
Jerome v. Flagg.....	221	Judd v. Fulton.....	293, 294
Jessurun v. Mackie.....	563	Judd v. Smith.....	329
Jetter, Matter of.....	245	Judd Linseed Oil, etc., Co. v.	
Jewett v. Crane.....	536, 537	Hubbell	799
		Judson v. Cent. Vt. R. R. Co.	786
		Juliano Ware Co. v. Sands.	416, 471

Julien v. Lalor.....	176
Julio v. Ingalls.....	844, 846
Jurgens v. Tum Suden.....	621
Justum v. Bricklayers' Union	
	355, 356

K.

Kabell v. Hudson.....	760
Kaiser v. Kaiser.....	97
Kain v. Dickel.....	382
Kain v. Larkin.....	464
Kamp v. Kamp.....	280, 801
Kane v. Prentice.....	124
Kane v. Vanderburgh.....	579
Kanouse v. Martin.....	66
Kapp v. Barthan.....	709
Kastner v. Durant.....	235
Kattenstroth v. Astor Bk....	702
Kaufman v. Keenan.....	46
Kaufman v. Lee.....	169
Kautz v. Vandenburgh.....	
	771, 772, 774
Kay v. Whittaker.....	384
Keeler v. Brooklyn Ele. R. R.	
Co.	748
Keeler v. Vanderpool.....	791
Keeney v. Home Ins. Co.....	716
Keep v. Kaufman.....	412
Keep v. Lord.....	450
Keifer v. Thomass.....	384
Keilty v. Traynor.....	843
Kelley v. McMahon.....	601
Kellogg v. Baker.....	
	324, 384, 387, 436
Kellogg v. Howell.....	800
Kellogg v. Paine....	352, 358, 359
Kelly v. Babcock.....	648
Kelly v. Barnett.....	380
Kelly v. Countryman.....	628
Kelly v. Downing.....	419
Kelly v. Jeroloman.....	585, 591
Kelly v. McCormick.....	781
Kelly v. Potter.....	102
Kelly v. Roberts.....	649
Kelly v. Scripture.....	491
Kelly v. Sheehan.....	283, 797
Kelly v. West.....	758, 759

Kelly v. Woman Pub. Co.....	340
Kelsey v. Bradbury.....	164
Kelsey v. Griswold.....	113
Kelsey v. Jewett.....	831
Kelsey v. Sargent.....	353
Kendall v. Washburn.....	219, 226, 777
Kendrick, Matter of.....	107, 115
Kennedy v. N. Y. Life Ins. &	
T. Co.	221, 222
Kennedy v. Simmons....	513, 583
Kennedy v. Twenty-third St.	
R. R. Co.....	136
Kent v. Church of St. Michael	141
Kent v. West.....	133
Kenyon v. N. Y. C. & H. R.	
R. R. Co.....	786
Kern v. Rackow.....	516, 518
Kerr v. Blodgett.....	161, 317
Kerr v. Hays.....	389
Kerr v. McGuire.....	283
Kerr v. Mount.....	189, 682
Kerr v. Un. Mut. L. Ins. Co..	153
Kessler v. Levy.....	495
Ketchum, Matter of.....	34
Keteltas v. Myers.....	329, 330
Keyes v. Ellensohn.....	184
Key West Bldg. Asso. v. Bank	
of Key West.....	674
Kibbe v. Wetmore.....	
	623, 678, 680, 788
Kidd v. Dennison.....	579
Kidder v. Horrobin.....	55, 56
Kieley v. Mfg. Co.....	628, 629
Kiernan v. Manhattan Quo.	
Tel. Co.	572
Kilbourne v. B'd. of Super-	
visors	94
Kilbourne v. St. John.....	573
Killmer v. Hobart.....	613
Kilts v. Seeber.....	769
Kincaid v. Archibald.....	115
Kincaid v. Richardson.....	91
Kindberg v. Freeman.....	242
Kingham v. Robbins.....	761
King v. Barnes.....	264
King v. King... ..	643, 678, 707, 788
King v. Leighton.....	261
King, Matter of.....	51

King v. Townshend.....	179		
King v. Utica Ins. Co.....	427		
Kingsley v. Kingsley.....	437		
Kip v. N. Y. & Harlem R. R. Co.	467		
Kirby v. Colwell.....	682		
Kirkland v. Aikin.....	345		
Kissam v. Marshall.....	642, 782, 790		
Kissock v. Grant.....	640		
Kittle v. Kittle.....	558, 559		
Kittle v. Van Dyck.....	177		
Kloh v. N. Y. Fertilizer Co..	681		
Klump v. Gardner.....	271		
Knapp v. City of Brooklyn..	321		
Knapp, Matter of.....	33, 34, 47		
Knapp v. Roche.....	370, 433		
Knapp v. Valentine.....	122		
Knauer v. Knauer.....	823		
Kneeland v. Martin.....	794		
Knickerbacker v. DeFreest..	188		
Knickerbocker Ice Co. v. Shultz	180, 556		
Knickerbocker L. Ins. Co. v. Ecclesine	484, 485, 508		
Knight v. Beach.....	758		
Knoch v. Funke.....	815		
Knox v. Baldwin.....	94		
Knox v. McDonald.....	563		
Knox v. Metro. Ele. R. Co....	85		
Koehler v. Adler.....	433		
Koehler v. F. & D. Bk.....	591		
Koepke v. Bradley.....	166, 171		
Kokomo Strawboard Co. v. In- man	782		
Korn v. Met. Ele. R. R. Co....	141		
Kostar v. Board of Excise...	569		
Krause v. Rutherford.....	510, 511		
Kreiss v. Seligman.....	359		
Kramer v. Police Dept.....	577		
Krower v. Reynolds.....	404		
Kuhlman v. Orser.....	645		
Krumbeck v. Clancy.....	811		
Kuh v. Barnett.....	258		
Kuhne v. Daily.....	33		
Kuntz v. The C. C. White Co..	603		
Kursheedt v. W. D. S. Inst...	242		
Kunz v. Bachman.....	238		
		L.	
		Lachenmeyer v. Lachenmeyer	513
		Lacker v. Dresler.....	254, 631
		Lacustrine, &c., Co. v. Lake Guano Co.	576
		Lacy v. Wilkinson.....	335
		Ladd v. Stevenson.....	797
		Ladd v. Terre Haute C. & M. Co.	220
		Ladenburg v. Coml. Bk.....	777
		Ladew v. Hart.....	561
		Ladow v. Groome.....	255
		LaFarge v. Mitchell.....	226
		LaFarge v. Van Wagenen....	274
		LaForge v. Chilson.....	770
		LaFrombois v. Jackson.....	88
		Laimbeer v. Allen.....	254
		Laing v. Morse.....	252
		Lambert v. Perry.....	355
		Lamkin v. Douglass..	614, 636, 641
		Lamkin v. Oppenheim.....	506
		Lamkin v. Starkey.....	504
		Lammer v. Stoddard.....	113
		Lamming v. Galusha....	412, 417
		Lamson Store Ser. Co. v. Conyngham	336, 432
		Lamont v. Cheshire.....	242
		Landers v. Fisher.....	607
		Landon v. Van Etten.....	775
		Lane v. Cary.....	283
		Lane v. N. Y. L. Ins. Co.	309, 313
		Lane v. Hayward.....	795
		Langdon v. Brown.....	359
		Langdon v. Townshend....	141, 176
		Langley v. Hawk.....	709
		Langley v. Warner.....	789
		Lanslow, Matter of.....	50
		Lanpher v. Clark.....	371
		Lansing v. Bliss.....	162
		Lansing v. Easton.....	593
		Lansing v. Eddy.....	562
		Lansing v. Ensign.....	48
		Lansing v. Hadsall.....	334
		Lansing v. Lansing.....	782
		Lansing v. McKillup.....	288
		Lansing v. Parker.....	437

Lapaugh v. Wilson.....	784	Leggett v. Mut. L. Ins. Co....	176
Lapeous v. Hart.....	513	Lehigh Coal Co. v. Central R.	
Larned v. Hudson.....	408	R. of New Jersey.....	728
Lasher v. Williamson.....	443	Lehmaier v. Buchner.....	632
Lasson v. Aronson.....	196	Lehman v. Williams.....	657
Latham v. Richards....	373, 374	Lemon v. Smith.....	820
Lattin v. McCarthy....	403, 409, 473	Lennon v. Stiles.....	244
Latourette v. Latourette....	646	Lennox Corporation, Matter of	730
Laufer v. Sayles.....	94	Lent v. McQueen.....	712
Laurie v. Laurie.....	588	Leon v. Bernheimer.....	397
Lavalle v. Skelly....	297, 777, 797	Leonard v. Columbia S. Nav.	
Lavery v. Hannigan.....	557	Co.	55
Lawlor v. Magnolia Metal Co.		Leonard v. Morris.....	178
	675, 695	Leonard v. Pitney.....	114
Lawrence v. Bk. of Republic	647	Leopold v. Poppenheimer....	393
Lawrence v. Foxwell.....	506	Lerche v. Brasher.....	446
Lawrence v. Hopkins.....	114	LeRoy v. Bedell.....	305
Lawrence v. Jones....	246, 676, 801	LeRoy v. Mayor, etc....	66, 567
Lawrence v. Mayor, etc....	553	Leroy v. Shaw.....	163
Lawrence v. Miller.....	756	Leslie v. Leslie.....	457
Lawrence v. Saratoga L. R.		Levey v. N. Y. C. & H. R. R.	
R. Co.	548	R. Co.	837, 842
Lawrence v. Wright.....	320, 397	Levy v. Bernhard.....	514, 519
Lawton v. Green.....		Levy v. Levy.....	476
	600, 601, 602, 603, 605	Lewin v. Wright.....	365, 779
Lawton v. Kiel....	260, 639, 787	Lewis v. Acker.....	429, 437
Lawton v. Lawton.....	142	Lewis v. Day.....	48
Lawton v. Shepherd.....	766	Lewis v. Duane.....	42
Lazier v. Westcott.....	323	Lewis & Fowler Mfg. Co.,	
Leach v. Cook.....	620	Matter of	715
Leavenworth v. Packer.....	440	Lewis v. Graham.....	264
Leavitt v. Dabney.....	602	Lexington Ave., Matter of..	46
Lee v. Hunter.....	646	Liddell v. Paton.....	491
Lee v. Jacob.....	381	Lightfoot v. Cameron.....	202
Lee v. LaCompagnie Univer-		Lignat v. Redding.....	448
selle, etc.	638, 639	Linden v. Fritz.....	420
Lee v. Vacuum Oil Co.....	48	Linden v. Hepburn.....	540
Lee v. Valley Paper Mill....	637	Link v. Mack.....	757
Lee v. Whallon.....	180	Linton v. W. F. Co.....	427
Leef v. Nassau Elec. Co....	49	Lintz v. Howard.....	773
Leetch v. Atlantic Mut. Ins.		Lintzenich v. Stevens.....	362
Co.	791	Lipman v. J. A. I. Works....	478
Lefevre v. Laraway.....	188	Lipman v. Shapiro.....	490
Lefferts v. Brampton....	833, 844	Lisher v. Parnelee.....	268
Leffingwell v. Chave.....		Lister v. Wright.....	56
	581, 587, 589, 790	Litchfield v. Burwell.....	
Leggett v. Dubois.....	821, 828		188, 211, 213, 290

Littell v. Sayre.....	411, 475	Lorillard, Matter of.....	47
Littlefield v. Albany Co. Bk..	450	Loring v. Binney.....	227
Littlefield v. Littlefield.....	116	Loring v. Morrison.....	769
Littlefield v. Murin.....	290, 423	Losee v. Bullard.....	98, 114
Littlejohn v. Attrill.....	577	Losee v. Stanley.....	193
Littlejohn v. Leffingwell....		Lottimer v. Lord.....	
	25, 225, 578, 609		697, 699, 716, 721, 726
Littlejohn v. Munn.....	333	Lough v. Outerbridge.....	436
Livermore v. Rhodes.....	622	Love v. Deiskes.....	151
Livermore v. Bainbridge.....	795, 816	Love v. Humphrey.....	504
Livingston v. Bank of N. Y.	587	Lovell v. Martin.....	516, 518
Livingston v. Curtis.....	836	Loveridge v. Hill.....	52
Livingston v. Hammer....	379, 427	Lovett v. Pell.....	408
Livingston v. Harrison.....	437	Low v. Graydon.....	801, 835, 844
Livingston v. Livingston....	576	Low v. Hart.....	575
Livingston v. McIntyre.....	288	Lowber v. Mayor, etc.....	269
Livingston v. N. Y. Ele. R. R.		Lowerre v. Owens.....	244
Co.	289	Lowman v. E. C. & N. R. R.	
Livingston v. Peru Iron Co..	88	Co.	41
Livingston v. Radcliff.....	41	Lowry v. Inman.....	480
Livingston v. Reynolds.....	579	Lucas v. Albee.....	504
Livingston v. Van Ingen....	556	Lucas v. East Stroudsburgh	
Llorens v. Costa.....	707	Glass Co.	450
Lloyd v. Burns.....	429	Lucas v. Johnson.....	168
Lobb v. Hundson.....	525	Lucas v. Trustees of Bap. Ch.	802
Locke v. Covert.....	746	Ludlow v. McCarthy.....	446
Lockmen v. Reilly.....	177	Ludvigh v. Dusseldorf.....	541
Lockwood v. Brantly.....	222	Ludwig v. Blum....	190, 628, 813
Lockwood v. House.....	52	Ludwig v. Gillispie.....	159
Loder v. Hatfield.....	92	Lugar v. Byrnes.....	386
Loder v. Whelpley.....	52	Lukens Iron, etc., Co. v. Payne	
Loew, Matter of.....	31		622, 634
Loftus, Matter of.....	282	Lumbard v. S. B. & N. Y. R. R.	
Londrigan v. N. Y. & N. H.		Co.	775
R. R. Co.....	103	Lunney v. Mayor.....	367, 778
Long v. Greville.....	760	Lust v. Hastings.....	43
Long v. Mayor, etc.....	746	Lutz v. Third Ave. R. R. Co..	830
Longuemare v. Nichols.....	523	Lyle v. Smith.....	800
Longyear v. Carter.....	47	Lynch v. Crary.....	642, 649
Loomis v. Decker.....	115	Lynch v. Livingston.....	18
Loomis v. Thirty-fourth St. R.		Lynch v. Todd.....	338
R. Co.	589	Lynde v. Montgomery.....	620
Lord v. Cheesborough....	230, 380	Lyon v. Baxter.....	637
Lord v. Lord.....	158	Lyon v. Botchford.....	588, 593
Lord v. Spielman.....	833	Lyon v. Cahill.....	43
Lord v. Vandenburgh.....	289	Lyon v. Park.....	
Lord v. Vreeland.....	465		809, 810, 815, 821, 822
Lorillard v. Clyde.....	321, 468	Lyon v. Yates.....	682

Lyons v. Murat.....	137, 342
Lyster v. Pearson.....	204
Lyth v. Green.....	430

M.

Matter of, See name of party.	
McAlexander v. Wright.....	39
McAllen, Petition of.....	135
McAllister v. Pond.....	834
McArdell v. Olcott.....	161
McBride v. Am. Surety Co..	476
McBride, Matter of.....	34
McBride v. Farmers' Bk..	613, 667
McCabe v. Goodfellow.....	147
McCaffery v. Smith.....	557
McCallum v. Barnard.....	533
McCarthy v. McCarthy..	190, 215
McCarthy v. Peake.....	702
McCarty v. O'Donnell.....	383
McCaulay v. Palmer.....	279
McClave v. Thompson.....	149
McClellan v. Duncombe.....	355
McClure v. Wilson.....	412
McCombs v. Allen.....	641
McCool v. Boller.....	225
McCormick v. Penn. R. R. Co.	59
McCoun v. N. Y. C. & H. R. R. R. Co.....	194
McCracken v. Flannagan.....	222
McCrane v. Moulton.....	781
McCrea v. Hopper.....	454
McCreery v. Ghormley.....	848
McCue, Matter of, v. Super- visors	76
McCue v. Tribune Assn..	261, 262
McCulloch v. Norwood.....	823
McCulloh v. Paillard Watch Co.	208
McCullough v. Carrigan.....	650
McCullough v. Pence.....	480
McCully v. Heller.....	220, 227
McDonald v. Brass Goods Mfg. Co.	185
McDonald v. James.....	604
McDonald v. Davis.....	373, 458
McElvey v. Lewis.....	705
McElwain v. Corning.....	785

McElwee Mfg. Co. v. Trow- bridge	456
McEncroe v. Decker.....	431, 608
McEwen v. Mont. Co. Mut. Ins. Co.	283
McFarland v. Delaney.....	590
McGarry v. Smith.....	721
McGean v. Met. Ele. R. R. Co.	822
McGinn v. Ross.....	654, 661
McGown v. Leavenworth..	235, 296
McGrath v. Maxwell.....	122
McGregor v. McGregor.....	150
McGuffin v. Dinsmore....	147, 833
McGuire v. Bausher.....	494
McGuire v. Bloomingdale....	546
McGuire v. N. Y. C. & H. R. R. R. Co.....	813
McHench v. McHench.....	724
McHenry v. Jewett..	542, 545, 546
McHugh v. B. H. & E. R. R. Co.	542
McIlhanney v. Magie.....	838
McIntire v. Rowan.....	781
McIntosh v. Ensign.....	165
McIntosh v. McIntosh.....	485
McIntyre v. Bank.....	282
McIntyre v. Carrier.....	74
McIntyre v. Sanford.....	22
McIntyre v. Trumbull.....	21
McKay v. Harrower.....	691
McKee v. Flaherty.....	278
McKeen v. Fish.....	812
McKenzie v. Farrell.....	427
McKenzie v. L'Amoureux...	159
McKenzie v. Rhodes.....	51
McKenzie v. Smith.....	533
McKeon v. See.....	565
McKernan v. Robinson..	123, 124
McKinlay v. Fowler....	618, 682
McKinney v. Collins.....	221, 800
McKinney v. McKinney.....	352
McKnight v. Baker.....	235
McKoney v. Glen.....	781
McKyring v. Bull..	322, 433, 435
McLachlin v. Brett.....	791, 816
McLaren v. McMartin.....	116
McLaughlin v. Bieber.....	234
McLaughlin v. Nichols.....	327

McLean v. Stewart.....	784, 786	Mang, Matter of.....	183
McLoughlin v. Crawford....	187	Manhattan Iron Works v. French	568
McLoughlin v. Mayor.....	827	Manhat. R. R. Co. v. Taber..	276
McMahon v. Brooklyn City R. R. Co.	280	Manice v. Gould.....	675
McMahon v. Rauhr.....	70	Manley v. Bonnel.....	836
McManus v. Western Assoc. Co.	426, 432	Manley v. Leggett.....	589, 595
McMaster v. Davidson.....	149	Manley v. Rassiga.....	720
McMullen v. Rafferty....	112, 116	Man. & Mer. Bk. v. Cowden..	259
McMurray v. McMurray..	187, 188	Mann v. Fairchild.....	102
McNamee v. Tenny.....	115	Mann v. Marsh.....	475
McNamara v. Nolan.....	135	Mann v. Milne.....	464, 476
McNulta v. Huntington.....	816	Mann v. Pentz.....	744
McParland v. Bain.....	744	Manne v. Carlson.....	379
McPherson v. Cox.....	41	Manneck Mfg. Co. v. Manneck	542, 560
McQuigan v. D., L. & W. R. R. Co.	837	Manning v. Benedict.....	357
McRobert v. Harrison.....	563	Manning v. Cassidy.....	600
McRobert v. Pooly.....	376	Manning v. Gould.....	302
McSorley v. Gombrecht.....	577	Manning v. Pratt.....	813
McTeague v. Coulter.....	409	Manning v. Stern.....	706
McVey v. Contrell.....	387	Manning v. Winter.....	434
McVickar v. Keating....	722, 783	Manton v. Poole.....	615
Mabie v. Adams.....	378	Mapes v. Brown.....	193, 361
Macaulay, Matter of.....	343	Mapes v. Snyder.....	812
Mackay v. Lewis.....	503, 504	Maples v. Mackey.....	214
Mackey v. Auer.....	464	Mapleson v. Del Puente.....	570
Mackey v. Daniel.....	517	Marble v. Lewis.....	770
Mackinnon v. Barnes.....	323	Marcele v. Satlzman.....	266
Madders v. Whallon.....	369	March v. Davison.....	840
Madison Av. Bap. Ch. v. Bap. Ch. in Oliver Street.....	67	March v. Ludlum.....	52
Magee v. Cutler.....	162, 569	Margraf v. Muir.....	409
Magnin v. Dinsmore.....	774	Marie v. Garrison.....	325, 348, 462, 467, 474
Magnolia Metal Co. v. Ster- lingsworth.....	44	Mark v. City of Buffalo...	40, 285
Mahr v. N. W. F. Ins. Soc...	142	Mark v. Hyatt.....	600, 603
Malcolm v. Fullerton.....	760	Markell v. Nester.....	815
Malcomb v. Miller.....	547	Market Nat. Bk. v. Pacific Nat. Bk.	227, 294
Malcomb v. Jennings.....	19	Marks v. La Soc. Anonyme...	201, 202
Mallory v. Norton.....	561	Marks v. Townsend.....	407
Malone v. Sherman.....	347	Marquat v. Marquat.....	419
Manchester v. Braedner.....	115	Mars v. Albany Sav. Bk.....	311
Manchester v. Herrington..	824, 831	Marselis v. Seaman.....	196
Manda v. Etienne.....	641	Marsh v. Benson.....	66
Mandeville v. Reynolds.....	81	Marsh v. Berry.....	785
Mandeville v. Winne....	235, 333	Marsh v. Hussy.....	723

Marsh v. McNair.....	377	Mattlage v. N. Y. El. R. R. Co.	543
Marsh v. Woolsey.....	282	Maxfield v. Taylor.....	664
Marshall v. Bresler.....	395, 464	Maxon v. Cain.....	33
Marshall v. Meech.....	46, 47, 48, 270	Maxson v. D., L. & W. R. R.	
Marshall v. Peters.....	577	Co.	99
Marshall v. Rockwood.....	339	Maxwell, Matter of.....	39
Marstaller v. Mills.....	809	May v. Cooper.....	278
Marten v. Van Schaick.....	706	Mayer v. Frankfeld.....	163
Martin v. Aluminum Co.....	254, 632	Mayer v. Friedman.....	104
Martin v. Gross.....	507, 516	Mayer v. Gilligan.....	562
Martin v. Home Bank.....	363	Mayer v. Mayer.....	356
Martin v. Kanouse.....	381	Mayer v. Mayor, etc.....	573
Martin v. Kunzmuller.....	450	Mayor v. Coffin.....	306
Martin v. Lynch.....	491	Mayor, etc. v. Conover....	279, 566
Martin v. Platt.....	53	Mayor, etc. v. Doody.....	328
Martin v. Rector.....	167	Mayor, etc. v. East Bay L. &	
Martin v. Spofford.....	833	Imp. Co.	795
Martine v. Albro.....	836	Mayor, etc. v. Eisler....	192, 195
Marvin v. Brandy.....	229	Mayor, etc. v. Genet.....	637, 643
Marvin v. Ellwood.....	310, 312	Mayor, etc. v. Ketcham....	455
Marvin v. Lewis.....	267	Mayor, etc. v. Longstreet....	557
Marvin v. Marvin.....	293	Mayor, etc. v. Lyons.....	805
Marvin Safe Co. v. Mayor, etc.	553	Mayor, etc. v. N. Y. & S. I.	
Marx v. Ciancimino....	674, 675	Ferry Co....	549, 589, 591, 592
Mason v. Bidleman.....	257	Mayor, etc. v. Smith.....	232
Mason v. Hand.....	194	Mayor of Albany v. Cunliff..	349
Mason v. Henry.....	96, 745	Mayor of Rochester v. Curtiss	564
Mason v. Libbey.....	203	Mayne v. Griswold.....	148
Mason v. N. Y. Silk Mfg. Co.	746	M. E. Ch. in Pultney v. Stew-	
Masten v. Blackwell.....	819	art	143
Masten v. Olcott.....	163	Mead v. Jenkins.....	174
Masters v. De Zavala.....	458	Meade v. Langford.....	74
Masterton v. Bolts.....	147	Meager v. Smith.....	760
Mather v. Hannaur....	514, 525	Mechanics' Bk. v. Levy.....	325
Mathez v. Neidig.....	149	Mechanics' Bk. v. Minthorne..	778
Matthews v. Cook.....	793	Mechanics' & Tr. Bk. v. Dakin	614
Matthews v. D. & H. C. Co..		Meech v. Calkins.....	257
	809, 812	Meekin v. Brooklyn H'gts.	809, 810
Matthews v. Matthews.....	435	Mehesy v. Kahn.....	838
Matthews v. Murchison..	602, 604	Meldon v. Devlin.....	786, 790
Matthews v. Noble.....	12	Meneely v. Meneely.....	575
Matthews v. Smith.....	344	Mensac, In Re.....	134
Matthews v. Tufts.....	201, 202	Merchants' Nat. Bk. v. Com.	
Matter of, See name of party.		Ex. Bk.	458
Mattice v. Gifford.....	585	Merchants' Tr. Co. v. Kings	
Mattison v. Demarest.....	161	Co. El. R. R. Co.....	738
Mattison v. Smith.....	389, 428	Meucci v. Raudnitz.....	484

Merchant v. N. Y. L. Ins. Co.	421	Millady v. Stein	812
Merchants' Bk. of New Haven		Millbank v. Broadway Bk.	790
v. Bliss	38	Millbank v. Jones	435
Merchants' Nat. Bk. v. Columbia Co.	632, 634	Miller v. Brenham	103, 212
Merguelle v. Continental Bank-Note Co.	844	Miller v. Bush	157
Merkee v. City of Rochester	231	Miller v. Downing	88
Merriam v. Wood & Parker Co.	638, 674	Miller v. Freeborn	455
Merrick v. Van Santvoord	59	Miller v. Heath	479
Merrill v. George	201	Miller v. Johnson	374
Merrill v. Grinnell	393	Miller v. Jones	208, 220
Merritt v. Baker	269	Miller v. Levy	171
Merritt v. Bartholick	175	Miller v. Losee	460
Merritt v. Carpenter	105, 486	Miller v. McClosky	430, 431
Merritt v. Lyon	130	Miller v. Miller	427
Merritt v. Lyons	722	Miller v. Parks	519
Merritt v. Sparling	721	Miller v. Ring	315
Merritt v. Thompson	276, 537, 541, 765, 767	Miller v. Rogers	815
Mertz v. Fenouillet	626	Miller v. Schall	44, 288
Metcalf v. Clark	200	Miller v. Wood	95
Meth. Ch., etc. v. Barker	603	Milliken v. Dart	622
Meton, etc. v. Isham Wagon Co.	340	Millius v. Shafer	254
Met. El. R. R. Co. v. Manhat. El. R. R. Co.	610	Mills v. Bliss	238, 239, 244
Met. Trust Co. v. T. V. & C. R. R. Co.	721	Mills v. Corbett	626
Meyer v. Belden	486, 507	Mills v. Davis	112
Meyer v. City of Louisville	786	Mills v. Hildreth	533
Meyer v. Feigel	370	Mills v. Mills	92
Meyer v. Lent	270	Mills v. Thursby	264, 789
Meyer v. Lexow	747	Mills v. Van Voorhies	177
Meyer v. Phillips	576	Mills v. Young	23
Meyer v. Seebald	705	Millville Mfg. Co. v. Salter	430
Meyer v. Van Collem	404	Miner v. Beekman	84, 92
Michaelis v. Towne	490	Miner v. Gardiner	837
Michaels v. Hain	201	Minier, <i>ex parte</i>	25
Michigan v. Phoenix Bank	56	Minturn v. Main	144
Mickles v. Hart	21	Mitchell v. Allen	271, 367, 373, 375, 795
Middleton v. Dodswell	709	Mitchell v. Barnes	705
Middletown v. R. & O. R. R. Co.	279, 550	Mitchell v. Bettman	547
Milburn v. Fowler	556	Mitchell v. Volgar	296
Miles v. Brown	652	Moffat v. Fulton	493
Milhau v. Sharp	553, 564	Moffit v. McLaughlin	464
		Mohawk Bridge Co. v. Utica & Schenectady R. R. Co.	564
		Mojarrieta v. Saenz	252, 629, 639, 791
		Moloney v. Dows	338
		Molloy v. Lennon	217
		Moloughney v. Kavanagh	51, 316

Montegriffo v. Musti.....	194	Morse v. Cloyes.....	558
Montgomery v. Ellis.....	797	Morse v. Morse.....	171
Montgomery v. Montgomery..	95	Mortimer v. Chambers.....	102
Montrait v. Hutchins....	264, 799	Morton v. Chesley.....	490
Mooney v. La Follette.....	494	Mosher v. Campbell.....	74
Moore v. Appleby.....	173	Mosher v. Yost.....	166
Moore v. Belloni.....	351	Moseley v. Alb. & N. R. R. Co.	823
Moore v. Board of Pilots....	569	Moses v. McDivitt.....	35
Moore v. Brink.....	152	Moser v. Polhamus.....	609
Moore v. Calvert.....	507	Moses v. Waterbury Button	
Moore v. Cooley.....	136	Co.	535, 536, 686
Moore v. City of Troy.....	137	Moss v. Cohen.....	404
Moore v. Hamilton.....	824	Mott v. Burnett.....	436
Moore v. McKinstry.....	810	Mott v. Consumers' Ice Co.	536, 837
Moore, Matter of.....	2	Mott v. Union Bk. of N. Y....	512
Moore v. Smith.....	413	Moulton v. Beecher.....	364, 394
Moore v. Taylor.....	698	Moulton v. Carty.....	799
Mora v. McCredy.....	838	Moulton v. Cornish.....	472
Mora v. Sun Mut. Ins. Co....	422	Muller v. Earle.....	374
Moran v. Helf.....	344	Muller v. Muller.....	367, 368
Moran v. Lydecker.....	162	Muller v. Perrin.....	508
Moran v. Sturgess.....	655	Mullins v. Metro. L. I. Co....	205
Moran v. Vreeland.....	833	Mulry v. Norton.....	576
More v. Deyoe....	166, 167, 169	Mumford v. Murray.....	43
More v. Rand.....	442	Mundt v. Glokner.....	151, 816
More v. Thayer.....	190, 817	Munger v. Shannon.....	349, 380
Moreland v. Sandford.....	801	Munn v. Barnum.....	284, 467
Morey v. Safe Deposit Co....	383	Munroe v. Merchant.....	87
Morford v. Davis.....	434	Munzinger v. Courier Co..	366, 781
Morgan v. Avery.....	619, 638	Murdock v. International T.	
Morgan v. City of Bingham-		& T. Co.....	14, 15
ton	553	Murdock v. Waterman.....	116
Morgan v. Fillmore.....	311	Murphy v. Baldwin.....	618
Morgan v. Morgan.....	835	Murphy v. Hall.....	618, 787
Morgan, Matter of.....	582	Murphy v. Jack.....	633
Mori v. Pearsall.....	16	Murphy v. Shea.....	213
Moriarty v. Bartlett.....	813	Murr v. Western Ass. Co....	756
Morrell v. Kimball.....	211	Murray v. Bethune.....	760, 761
Morris v. Crawford.....	314	Murray v. Blatchford.....	787
Morris v. Morange.....	288	Murray v. Hankin.....	636
Morris v. Talcott.....	495	Murray v. Hay.....	141
Morris v. Van Voast.....	100	Murray v. Jibson.....	49
Morris v. Wheeler.....	176	Murray, Matter of.....	32
Morris v. Whelan.....	566	Murray v. N. Y. Life Ins. Co.	432
Morrison v. L'Hommodieu....	359	Murray v. Vanderbilt.....	209
Morrison v. Metro. El. R. Co.	784	Murray Hill Bk., Matter of..	731
Morrison v. Watson.....	616	Murtha v. Curley.....	419, 421
Morrow v. Morrow.....	115	Muser v. Miller.....	499

Musgrave v. Sherwood.....	601	Neele v. Berryhill.....	18, 778
Musgrove v. Nash.....	724	Negus v. City of Brooklyn.....	568, 721
Mussina v. Stillman.....	384	Nehresheimer v. Bowe.....	386
Mut. Life Ins. Co. v. Bigler.....	2, 579	Neiberg v. Neiberg.....	345
Mut. Life Ins. Co. v. Carey.....	52, 53	Neilly, Matter of.....	113
Mut. Life Ins. Co. v. Dake.....	176	Neilly v. Neilly.....	143
Mut. Life Ins. Co. v. O'Donnell.....	285	Nellis v. DeForest.....	400
Mut. Life Ins. Co. v. Smith.....	123	Nellis v. Nellis.....	173
Myers v. Dorman.....	485	Nelson v. Brown.....	178
Myers v. Gerrits.....	341	Nelson v. Eaton.....	321
Myers v. Machado.....	158	Nelson v. Loder.....	757
Myers v. Overton.....	198	Nelson v. Nixon.....	144
Mygatt v. Wilcox.....	113	Nelson v. Plimpton F. P. El.	
Mynderse v. Snook.....	442	Co.	756

N.

N. H. W. Co. v. Ferris.....	517	Nemetty v. Naylor.....	454
Nagle v. Junker.....	785	Neuberger v. Webb.....	341, 344, 382
Nagle v. Taggert.....	203, 216	Neudecker v. Kohlberg.....	347, 399
Nanetty v. Naylor.....	377	Neugent v. Swan.....	601
Nason Mfg. Co. v. Garden.....	738	Neustadt v. Joel.....	540, 541
Nash v. Hall Signal Co.....	417	Neville v. Neville.....	499
Nash v. McCauley.....	396	New v. Aland.....	367
Nash v. Weidenfeld.....	448	Newberger v. Campbell.....	38
Nash v. White's Bk. of Buff.....	448	Newbury v. Furnival.....	805
Nassau Bank v. Yandez.....	311	Newbury v. Newbury.....	251, 607
Nathans v. Hope.....	405	Newcomb v. Reed.....	248
Nat. Bank v. Levy.....	151	Newell v. Doran.....	509
Nat. Bk. of Auburn v. Lewis.....	448	Newell v. Newell.....	373
Nat. Bk. of Port Jervis v.		New England Iron Co. v. N.	
Hanse 282		Y. Loan & Imp. Co.....	843
Nat. City Bk. v. N. Y. Gold		N. J. Steel & Iron Co. v. Rob-	
Ex. Bk. 786		inson 465	
Nat. Exhib. Co. v. Crane.....	47, 49	Newland v. Willett.....	789
Nat. Mich. B'k'g. Ass'n v.		Newman v. Newman.....	839
Usher 122		Newton v. Lee.....	449
Nat. Park Bk. v. Whitmore...		Newton v. Russell.....	603, 604
622, 635		N. Y. & Harlem R. R. Co. v.	
Nat. Pipe Co. v. Fisher.....	350	Haws 561, 563	
Nat. Shoe & Leather Bk. v.		N. Y. & Harlem R. R. Co. v.	
Mechanics' Nat. Bk. 764, 765		Mayor, etc.....	265
Nat. Union Bk. v. Riger.....	704, 706	N. Y. & N. H. R. R. Co. v.	
Naylor v. Lane.....	50	Schuyler.....	472, 558, 560, 583
Neal v. Sachs.....	633, 637	N. Y. & W. U. Tel. Co. v.	
Neale v. Osborne.....	590, 592	Jewett, Matter of.....	723, 726, 749
Nealis v. Am. Tube & Iron Co.	738	N. Y. Att. Pulv. Co. v. Van	
Nebenzahl v. Townsend.....	407	Tuyl 597	
		N. Y. Bank Note Co. v. Hamil-	
		ton Bank Note Co.....	833
		N. Y. Cab Co. v. Mooney.....	574

N. Y. Card Co. v. Union Pl. Card Co.	575	Nicoll v. Boyd.....	726, 727
N. Y. C. & H. R. R. R. Co. v. Pettit	831	Nicoll v. Spowers.....	716
N. Y. C. & H. R. R. R. Co. v. Shepherd	523	Niggli v. Froehry.....	435
N. Y. C. & H. R. R. R. Co. v. Village of Hastings.....	600	Niles v. Vanderzee.....	200
N. Y. Fire & M. Ins. Co. v. Burrell	753	Ninety Pl'fs. v. Vanderbilt...	39
N. Y. Ice Co. v. N. W. Ins. Co.	420, 785	Ninth Ave. R. R. Co. v. N. Y. El. R. R. Co..	543, 557, 564, 601
N. Y. Infant Asylum v. Super- visors of Westchester Co. .	572	Niver v. Niver.....	487
N. Y. Ins. Co. v. N. W. Ins. Co. of Oswego.....	81	Noble, <i>ex parte</i>	125
N. Y. Juv. Guardian Soc. v. Roosevelt	571	Noe v. Christie.....	159
N. Y. Life Ins. Co. v. Aitkin..	92, 123	Noe v. Gibson.....	718
N. Y. Life Ins. Co. v. Super- visors of N. Y.	540	Nones v. Hope Mut. L. Ins. Co.	204, 468
N. Y. Life Ins. & T. Co. v. Cuthbert	334	Noonan v. Grace.....	542
N. Y. Life Ins. & T. Co. v. Rand	14	Noonan v. N. Y., L. E. & W. R. R. Co.	272
N. Y. Mar. Iron Wks. v. Smith	326	Nordlinger v. De Mier.....	232
N. Y. Oxygen Co., Matter of.	809	Northampton Nat. Bk. v. Wylie	641
N. Y. Sec. & T. Co. v. Lipmar	595, 601	Northrop v. Hill.....	114
N. Y. State Milk Pan Ass'n. v. Remington Ag'r. Works.	366, 780	Northrup v. Van Deusen....	264, 270, 271
N. Y. Sub. Water Co. v. Bissell	600	Norton v. Dreyfuss.....	448
N. Y., W. Shore & B. R. R. Co., Matter of	805	Norton v. Hayes.....	139
N. Y. Wire Co. v. Westing- house, etc., Co.....	363, 773	Norton v. Snyder.....	576
Niagara Falls Int. B. Co. v. Gr't. Western R. R. Co....	544	Nosser v. Corwin.....	190
Niagara Grape Market Co. v. Wyant	644	Nourny v. Dubosty.....	329
Nichols v. Drew.....	417, 473	Noyes v. Wernberg.....	160
Nichols v. Jones.....	432	Noyes v. Wyckoff.....	755
Nichols v. Lumpkin....	465, 476		
Nichols v. Nichols.....	801		
Nichols v. Voorhis.....	573		
Nickerson v. Canton Marble Co.	336, 432		

O.

Oakes v. Howell.....	102
Oakley v. Aspinwall.....	13, 14
Oakley v. Bend.....	143
Oakley v. Morton.....	329
Oakley v. Tugwell.....	466
Obergon v. DeMier.....	537
O'Beirne v. Lloyd.....	405
O'Brien v. Blaut.....	810
O'Brien v. Browning.....	161
O'Brien v. Mech. & Traders F. Ins. Co.....	653, 654, 658
O'Callaghan v. Frazer.....	719
Ochs v. Frey.....	400
Ocean Nat. Bk. v. Fant.....	755
O'Connor v. Garrigan.....	175
O'Connor, Matter of.....	59

O'Connor v. N. Y. & Yonkers Land Imp. Co.....	603
O'Donnell v. McMurn.....	597
O'Dougherty v. Remington P'pr Co.	441
Oechs v. Cook.....	427
Oelberman v. N. Y. & N. R. R. Co.	374
Oertel v. Wood.....	549
Oestrich v. Gilbert.....	42
Ogden St., Matter of.....	12
Ogden v. Devlin.....	43, 44
Ogden v. Prentice.....	153
O. & L. C. R. R. Co. v. Vt. & Canada R. R. Co.....	204, 210, 232, 468
Ogdensburgh Bk. v. Paige....	466
O'Keefe v. Shepard.....	41
Olcott v. Carroll....	347, 388, 475
Olcott v. McLean.....	56, 231
Olcott v. Tioga R. R. Co.....	103, 104
Olean R. Co. v. Fairmount Co.	210
Olery v. Brown.....	146
Oliver v. French.....	264
Oliwell v. Verdenhalven....	48
Olpherts v. Smith.....	747
Olsen v. Smith.....	545
O'Mahoney v. Belmont.....	699, 701, 708
Oneida Nat. Bk. v. Paldi....	668
O'Neil v. Bender.....	225
O'Neil v. Durkee.....	529
O'Neil v. Hoover.....	796
O'Neil, In Re.....	52
O'Neill, Matter of.....	29
Oothout v. Thompson.....	116
Opdyke v. Marble.....	838
Oppenheimer v. Hirsch.....	608
Oregon S. S. Co. v. Otis.....	371
O'Reilly v. Freel.....	682
O'Reilly v. Kingston.....	12
Orient Mut. Ins. Co., Matter of	749, 750
Orleans Co. Nat. Bk. v. Spen- cer	803
Ormsbee v. Brown.....	375
Orr v. Currie.....	222
Orr v. McEwen.....	217

Orser v. Glenville Woolen Co.	824
Orvis v. Dana.....	357
Orvis v. Goldschmidt....	343, 627
Osborn v. McCloskey.....	19
Osborne v. U. S. Bank.....	40
Osgood v. Maguire....	728, 745
Osgood v. Ogden.....	452
Osgood v. Whittelsey.....	479
Ostell v. Brough.....	491
Osterhoudt v. Supervisors of Ulster Co.	157
Osterman v. Goldstein.....	757
Ostrander v. Conkey.....	364
Ostrander v. Harper.....	135, 136
Ostrom v. Bixby.....	436
O'Sullivan v. Connors.....	789
Oswego Falls Br. Co. v. Fish.	567
Otis v. Gray.....	316
Otis v. Ross.....	437
Owens v. Hudnut's Pharmacy	380, 413

P.

Pacific Mail S. S. Co. v. Toel	600, 603
Packard v. Wood.....	822
Paddock v. Palmer.....	339
Paddock v. Beebee.....	289
Paff Exr. v. Kinney.....	91
Page v. Boyd.....	347
Page v. Willett.....	350
Paget v. Stevens.....	219, 220
Paine Lumber Co. v. Galbraith	230
Pallen v. Johnson.....	840
Palmer v. Bennett.....	104
Palmer v. Board of Ed....	566
Palmer v. Chicago Eve. Post	
Co.	209
Palmer v. Davis.....	481
Palmer v. DeWitt.....	548
Palmer v. Foley....	566, 597, 600
Palmer v. Hussey.....	505
Palmer v. Lawrence.....	787
Palmer v. Penn. R. R. Co....	209
Palmer, Matter of.....	813
Pardee v. Leitch.....	653
Pardi v. Conde.....	341, 344, 382

Park v. Nat. Druggists Association	321, 385	Peck v. Yorks.....	606
Parke v. Heath.....	781	Peekamoose Fishing Club, Matter of	271
Parker v. Jackson.....	164	Peetsch v. Sommers.....	664, 692
Parker v. Marco.....	201, 503	Pelo v. Clukey.....	515
Parker v. Pullman & Co....	421	Pendergast v. Greenfield....	452
Parker v. Stroud.....	112	Penfield v. White.....	590
Parker v. Williamsburgh....	44	Penoyer v. Kelsey...615, 624,	681
Parkhurst v. Rochester L. M. Co	74	Pennoyer v. Neff.....	60, 694
Parkhurst v. Wolf.....	323	People v. Albany Mayor's Ct.	781
Parks v. Parks.....	187	People v. Alb. Med. College..	290
Parmenter v. Roth.....	78, 279	People v. Albany & S. R. R. Co.	155
Parshall v. Tillou.....	390, 430	People v. Ambrecht.....	60
Parsons v. City of Rochester..	95	People v. Ames.....	792
Parsons v. Hayes.....	332, 477	People <i>ex rel</i> Andrus v. B'd. Town Ad'ts	24
Parsons v. Sprague.....	675, 683	People v. Arnold.....	93
Parsons v. Sutton.....	359	People v. Bank of Dansville..	721
Parsons v. Travis.....	530	People v. Bissell.....	567
Partridge v. Haley.....	389	People v. Blakeley.....	53
Partridge v. Menck.....	574	People v. Board of Supervisors	266
Patch v. Tribune Ass'n.....	475	People v. Booth.....	477
Patten v. Access. Trans. Co...	708	People v. Boston, A. T. & West. R. Co.....	128
Patterson v. Bloomer.....	602	People <i>ex rel</i> Broderick v. Morton	567
Patterson v. Copeland.....	811	People <i>ex rel</i> Boylston v. Tarbell	789
Patterson v. Delaney....254, 631		People v. Brower.....	591
Patterson v. Hare.....	373	People v. Brundage.....	16
Patterson v. Patterson...450, 452		People v. Buchanan.....	54
Patterson v. Perry.....	646	People v. Cady.....	259
Pattison v. O'Conner.....	296	People v. Campbell.....255, 502	
Paulsen v. Van Steenberg..	473	People v. Canal Board....567, 569	
Paulson v. N. J. & N. Y. R. R. Co.	316	People v. Carr.....	16
Payne v. Becker.....	171	People <i>ex rel</i> Cauffman v. Van Buren....547, 581, 590, 664,	665
Payne v. Smith.....	360	People v. Central City Bk.278, 701	
Payne v. Young.....	253	People v. Clark.....83, 492	
Peabody v. Washington Co. Mut. Ins. Co.....	466	People v. Coffin.....	543
Pearce v. Ferris.....	169	People v. Compton.....592, 593	
Pearsall v. Elmer.....	53	People v. Conklin.....	566
Peart v. Peart.....	247	People v. Conner.....12, 125	
Peck v. Elder.....	565	People v. Cooper.....	273
Peck v. Hulburt.....	100	People <i>ex rel</i> Crane v. Grant..	523
Pack v. Lombard.....	519	People v. Crooks.....	470
Peck v. Newton.....	166	People v. Dennison.....57, 453	
Peck v. N. Y. & N. J. R. R. Co.	419		
Peck v. Randall.....	89		
Peck v. Richardson.....141, 214			

People v. Dikeman.....	532	People v. N. Y. Juvenile Guar-	
People v. Draper.....	566	dian Soc.....	389
People v. Dunning.....	21	People v. N. Y. Manhattan	
People v. Dwyer.....	553	Beach Ry. Co.....	167
People v. Edson.....	582	People v. O'Neil.....	195
People v. Farley.....	566	People v. Oswego Ct. of Ses...	825
People v. Faulkner.....	155	People v. Phillips.....	493
People v. Globe Mut. L. Ins.		People <i>ex rel</i> Post v. Grant..	65
Co.	729	People v. Powers.....	155
People v. Green.....	155	People v. Pustolha.....	8, 65
People <i>ex rel</i> Grogan v. York		People v. Rector Trinity Ch..	83
781, 782		People <i>ex rel</i> Roberts v. Bowe.	517
People <i>ex rel</i> Hoffman v. B'd.		People <i>ex rel</i> Roosevelt v. Ed-	
Board of Supervisors.....	781	son	590
People v. Hermann.....	8, 65	People v. Ryder.....	320, 322, 324, 388
People v. Hess.....	54	People v. St. Nicholas Bank..	
People <i>ex rel</i> Hoffman v. B'd.		613, 631, 634	
of Education	44	People v. Sampson.....	566
People <i>ex rel</i> Ireland v. Dono-		People v. Schoonmaker.....	541
hoe	513, 582	People v. Schuyler.....	669
People v. Kearney.....	6	People v. Scott.....	528
People v. Knickerbocker L.		People v. Security Mut. L. A.	
Ins. Co.	824	Co.	746
People v. Livingston.....	83	People v. Shaw.....	14
People v. Lowe.....	128	People v. Smith.....	278, 279
People <i>ex rel</i> Lower v. Dono-		People v. Snyder.....	323
van	77	People v. Starkweather.....	810
People <i>ex rel</i> Mailbach v.		People <i>ex rel</i> Steingretter v.	
Dunn	182	County Canvassers.....	142
People v. McCumber..	379, 383, 396	People <i>ex rel</i> Strait v. Steuben	
People v. Mayor, etc.....		Com. Pl.	781
12, 155, 553, 586, 705		People v. Sturtevant.....	553, 590
People <i>ex rel</i> v. Mayor, etc...	712	People v. Superior Court....	777
People <i>ex rel</i> McNeary v. Mac-		People v. Sullivan.....	11
Lean	117	People v. Supervisors of Mon-	
People v. Met. Telephone Co.		roe	19
155, 180		People v. Sutherland.....	253
People v. Mut. Benefit Ass'ts.	750	People v. Tweed.....	484, 493, 526
People v. Mut. U. Tel. Co....	123	People v. Tioga C. P.....	252
People v. National Trust Co.		People v. Trinity Ch.....	89
272, 281		People v. Troy Steel & Iron Co.	719
People <i>ex rel</i> Negus v. Dwyer.	583	People v. Universal L. Ins. Co.	823
People <i>ex rel</i> N. Y. C., etc., R.		People <i>ex rel</i> Updyke v. Gillon	53
R. Co. v. Cook.....	781	People v. Vanderbilt.....	180
People v. Nichols.....	65, 66, 266	People v. Van Rensselaer....	83
People v. North Am. Bank...	155	People <i>ex rel</i> Waring v. Mon-	
People v. Norton.....	66, 704	roe Com. Pleas.....	353
People v. Nostrand.....	264	People v. Wasson.....	543, 560

People v. Welch.....	55, 56	Phillips v. Wheeler.....	247, 248
People v. Wells.....	406, 415	Phillips v. Wickham.....	567
People v. Wilson.....	33	Phillips v. Winne.....	215
People v. Young.....	8	Phinney v. Broschell.....	223, 224, 275
People v. Youngs.....	8	Phipps v. Carman.....	246, 282
Peppoon v. Jenkins.....	781	Phoenix v. Com'rs of Emig'n..	564
Perault v. Rand.....	561	Phoenix Bank v. Donnell.....	469
Percy, Matter of.....	30, 31	Phoenix Bridge Co. v. Key-	
Perkins v. Merchants' Lith.		stone B. Co.....	604
Co.	305	Phoenix Foundry Co. v. North	
Peri v. N. Y. C. & H. R. R. R.		R. Constr. Co.....	609
Co.	48, 49	Phoenix Ins. Co. v. Continental	
Perren v. Monmouthshire R.		Ins. Co.	554, 555
R. Co.	761	Phoenix Warehousing Co. v.	
Perroteau v. Johnson.....	407	Badger	746
Perry v. Dickerson.....	405	Pickett v. Leonard.....	117
Perry v. Kent.....	532, 801	Pidgeon v. Oatman.....	587
Perry v. Tynen.....	196	Pierce v. Waters.....	44
Person v. Civer.....	487	Pierson v. Freeman.....	254, 508, 631
Person v. Grier.....	201, 502	Pierson v. McCurdy.....	94
Persons v. Buffalo City Mills.	206	Pierson v. Morgan.....	816
Peters v. Delaplaine.....	92, 102	Pierson v. Safford.....	442
Peters v. Foster.....	56	Pignolet v. Bushe.....	707
Petersen, Matter of.....	32	Pilkington v. B'klyn Heights	
Peterson v. Chemical Bank...	150	R. R. Co.....	50
Petree v. Lansing.....	160	Pinckney v. Childs.....	769
Petrie v. Fitzgerald.....	296, 504	Pinckney v. Hagerman.....	248, 801
Petrie v. Petrie.....	410	Pindar v. Black.....	181
Petrie v. Williams.....	45	Pindar v. Seaman.....	834
Pettibone v. Drakeford.....	282	Pinkerton v. Bailey.....	117
Pettigrew v. Foshay.....	558	Pitney v. Glens Falls Ins. Co.	158
Pettit v. Pettit.....	786, 791	Pitt v. Coombes.....	202
Peyman v. Bowery Bank.....	453	Pitt v. Freed.....	498
Peyser v. McCormack.....	341	Pittenger v. S. T. Masonic, etc.	431
Pfeffer v. Kling.....	721	Pittsfield Bk. v. Tailer.....	399
Pfister v. Stumm.....	771	Place v. Minster.....	371
Pfluger v. Lescke.....	485	Place v. Riley.....	692
Pfohl v. Sampson.....	541, 560	Platner v. Lehman.....	757, 761
Pfohl v. Simpson.....	160	Platt v. Ashman.....	823
Phalen v. Dingee.....	163	Platt v. Crowford.....	323
Pharis v. Gere.....	372	Platt v. Jones.....	56
Phelps v. Nowlen.....	580	Platt v. Platt.....	836
Phelps v. Phelps.....	221, 345	Platt v. Townsend.....	296
Phelps v. Platt.....	834, 844	Platt, In Re.....	131
Phila. v. Postal Tel. Cable Co.	44	Plimpton v. Bigelow.....	648, 682
Phillips v. Gorham.....	81, 166, 319	Plympton v. Bigelow.....	260
Phillips v. Stagg.....	51	Polley v. Wilkisson.....	405, 412
Phillips v. Therrasson.....	94	Pomeroy v. Hindmarsh.....	547

Ralph v. Husson.....	346	Reilly v. Hart.....	228
Ramsey v. Childs.....	789	Reilly v. Sisson.....	637
Ramsey v. Gould.....	261	Reiners v. Brandhorst.....	332
Randall v. Carpenter.....	604, 605	Reinitz, Matter of.....	504
Randall v. Packard.....	45	Reis v. Rohde.....	552
Randall v. Sackett.....	811	Remington v. Wackel.....	433
Randall v. Van Wagenen....	46, 49	Remington Paper Co. v. O'Dougherty.....	14, 615, 616
Randel, Matter of.....	31, 32	Renard v. Hargous.....	613
Randolph v. Mayor, etc....	466	Renihan v. Dennin.....	52
Randolph v. Susquehanna Watch Co.	639	Renwick, Matter of.....	720
Rank v. Levinus.....	170, 408	Rep. of Mexico v. Arrangois..	39, 56, 301
Ranney v. Peyser.....	699	Rep of Mexico v. Ockenhausen	56
Ranney v. Russell.....	769	Rep. of Peru v. Reeves.....	816
Ransom v. Halcott.....	645	Requa v. Holmes.....	826
Raphael v. Mencke.....	91	Reubens v. Joel....	420, 544, 547
Rapp v. Williams.....	563	Reynolds v. Fisher.....	658
Rappaport v. Werner.....	165	Rhoads v. Woods.....	666
Rathbun v. Markham....	387, 388	Rhodes v. Wheeler.....	584
Rathburn v. N. Y. C. R. R. Co.	104	Rice v. Coutant.....	434
Raven v. Smith.....	75	Rice v. Ehele.....	2, 248
Raymond v. Hinman.....	781	Rice v. O'Conner.....	443
Raymond, Matter of.....	75	Rich v. Beekman.....	789
Rea v. Washington Mut. Ins. Co.	380	Richards v. Edick.....	474
Read v. French.....	40, 213, 214	Richards v. Goldberg....	588, 595
Ready v. Stewart.....	612, 614	Richards v. Porter.....	526
Reck v. Phenix Ins. Co.....	481	Richards v. Varnum.....	712
Rector v. Ridgewood Ice Co..	364	Richardson v. Draper....	811, 820
Rector of Ch. of Holy Inno- cents v. Keech.....	542	Ricetti v. Mapleson.....	637
Redfield v. Middletown.....	584	Richters v. Littell.....	70, 507
Redney v. Jewett.....	523	Richtmyer v. Richtmyer....	466
Reed v. Butler.....	831	Rider v. Bagley.....	708
Reed v. Chilson.....	231, 233, 234	Rider v. Bates.....	363
Reed v. Hayt.....	426, 434	Rider, Matter of.....	75
Reed v. Latson.....	379	Ridgway v. Bacon.....	145
Reed v. Mayor.....	365	Riggs v. Pursell.....	271, 272
Reed v. Reed.....	171, 187	Riggs v. Waydell....	771, 782, 785
Reeder v. Sayre.....	369, 371	Riggs v. C. Y. & P. R. R. Co..	641
Reese v. Walworth.....	380	Riley v. Riley.....	120
Ref'd Ch. of Gallupville v. Schoolcraft	84	Rinna v. R. I. Works.....	187
Regar, Matter of.....	46	Rinchev v. Stryker.....	664
Regina v. Bloxham.....	255	Rindge v. Baker.....	421
Reid v. Stegman.....	23	Rinn v. Astor F. Ins. Co.	729, 731
Reid v. Stenton.....	760	Ripley v. Burgess.....	290
Reid v. The Evergreens....	159	Ripley v. McCann.....	196
		Risley v. Brown.....	811
		Risley v. Carll.....	459

Risley v. Wightman.....	117	Rockwell v. Merwin.....	131, 720
Ritten v. Griffith.....	225	Rodgers v. Bonner....	645, 651, 655
Ritterman v. Ropes.....	486	Rodgers v. Rodgers.....	596
Roache v. Kivlin.....	337	Rodkinson v. Gantz.....	363
Robbins v. Palmer.....	385	Rodman v. Devlin.....	102
Robert v. Sadler.....	558	Rodman v. Hedden.....	113
Robert Gere Bk. v. Inman....	382	Roehr v. Liebman.....	414
Roberti v. Carlton.....	135	Roemer v. Stryker.....	434
Roberts v. Baumgarten.....	86	Rogers v. Durant.....	262
Roberts v. Berdell.....	113	Rogers v. McElhone.....	520
Roberts v. Bower.....	6	Rogers, Matter of.....	96
Roberts v. Buckley.....	75	Rogers v. McGuire.....	150
Roberts v. Doty.....	48	Rogers v. McLean.....	184, 792
Roberts v. Law.....	765	Rogers v. M. S. & N. I. R. R. Co.	547
Roberts v. Leslie.....	322, 396	Rogers v. N. Y. & Texas Land Co.	161
Roberts v. Mayor, etc.....	553	Rogers v. Rockwood.....	289, 290
Roberts v. O. & L. C. R. R. Co.	837	Rogers v. Rogers.....	260
Roberts v. Safety Buggy Co..	354	Rogers v. Schmersahl.....	214
Roberts v. Sykes.....	102	Rogers v. Vosburgh.....	384
Roberts v. White.....	601, 602	Rogers Loco. Wks. v. Kelly..	650
Robertson v. Robertson.....	135, 182, 364	Rohman v. Blust.....	234
Roberson v. Central R. R. of N. J.	104	Rollins v. Barnes.....	774
Robinson v. Bank.....	619	Romaine v. Brewster.....	446
Robinson v. Brisbane.....	818	Rome, W. & O. R. R. Co. v. City of Rochester.....	587, 608
Robinson v. Ecuador Devel. Co.	344	Rome, W. & O. R. R. Co. v. Smith	572
Robinson v. Flint.....	412	Roome v. Nicholson.....	384
Robinson v. Frost.....	139	Roosen v. Carlson.....	548, 570
Robinson v. Govers.....	278, 812	Roosevelt v. Bull's Head Bk..	755, 757
Robinson, Matter of.....	811	Roosevelt v. Dean.....	263
Robinson v. Moran.....	789	Roosevelt v. Fulton.....	266, 267
Robinson v. Nat. Bk. of New- bern	55, 56	Roosevelt v. Gardinier.....	355
Robinson v. Oceanic Steam Nav. Co.	59	Roosevelt v. N. Y. & Har. R. R. Co.	765
Robinson v. Phillips.....	88	Roosevelt v. Schermerhorn...	429
Robinson v. Preswick.....	579, 705	Root v. Price.....	395
Robinson v. Smith.....	148	Root v. Wright.....	54
Robie v. Sedgwick.....	84	Ropes v. Arnold.....	786, 790
Roby v. Hallock.....	382	Rorke v. Russell.....	590, 591
Roche v. Ward.....	229	Rose v. Meyer.....	329
Rochester Bar Assoc. v. Dorthy	31	Rosenberg v. Block.....	442
Rochester Distil. Co. v. O'Brien	446	Rosenberg v. Rosenberg.....	53
Rochfort v. Met. St. Ry. Co...	50	Rosenberg v. Salomon.....	142
Rock River Bk. v. Hoffman...	57	Rosenberg v. Stat. I. Ry. Co..	305
Rockwell v. Carpenter.....	784		

Rosenwald v. Hammerstein..	371		
Ross v. Bridge.....	726, 769		
Ross v. Ingersoll.....	665	Sabin v. Johnson.....	280
Ross v. Longmuir.....	343	Sabin v. Kendrick.....	224, 627
Ross v. Ross.....	115, 381	Saddlesvene v. Arms.....	617
Ross v. Vernam.....	707	Safety Steam Co. v. Dickson	
Ross v. Wigg.....	259, 506	Mfg. Co.	773
Rossner v. N. Y. Museum		Safford v. Snedecker.....	478
Ass'n.	285, 845, 850	Sage v. Culver.....	464
Rossow v. Bk. of Commerce...	595	Sage v. Quay.....	589
Roth v. Schloss.....	782	Sage v. Stafford.....	256
Rothschild v. Whitman.....	448	Sager Mfg. Co. v. Smith.....	747
Rouge v. Rouge.....	617	St. Amant v. De Beixcedon...	632
Rouget v. Haight.....	388	St. John v. American Mut. L.	
Rosensteil v. Van Cott.....	429	Ins. Co.	153
Rosenthal v. Rosenthal.....	388	St. John v. Beers.....	326
Roup v. Bradner.....	94	St. John v. Croel....	816, 821, 827
Roussel v. St. Nicholas Ins. Co.		St. John v. Denison.....	723
	348, 464	St. John v. Northrup.....	347
Rowell v. Moeller.....	365	St. L. & A. R. R. Co., Matter	
Rowland v. Phalen.....	328	of	340
Royal Ins. Co. v. Noble.....	683	Sales v. Woodin.....	267
Royer Wheel Co. v. Fielding..	413	Salhinger v. Adler.....	202, 503
Rozell v. Andrews.....	557	Salisbury v. Morse.....	101
Ruberry v. Binns.....	839	Salmon v. Gedney.....	65
Ruck v. Lange.....	238	Saltsman v. Shults.....	146
Ruckman v. Pitcher.....	144	Salters v. Bedford.....	549
Ruggles v. Keeler.....	104	Salzberg v. Mandlebaum..	621, 638
Rumsey, Matter of.....	150	Sanders v. Ader.....	544, 585
Ruppert v. Haug....	635, 674, 677	Sanders v. Soutter.....	322
Ruser v. Union Distil. Co....	626	Sanders v. Village of Yonkers.	471
Russel v. Somerville.....	51	Sanders v. Warren.....	238
Russell v. Clapp.....	320	Sand v. Church.....	168
Russell v. Meacham.....	764	Sandford v. Sinclair....	702, 711
Russell v. Popham.....	565	Sandland v. Adams.....	253
Rutherford v. Hewey.....	171	Sands v. Calkins.....	362, 363
Rutherford v. Krause.....	338	Sands v. Gelston.....	114
Rutter v. Boyd.....	659	Sands v. Hughes.....	88, 89
Rutter v. Puckhofer.....	187	Sands v. St. John....	349, 398, 464
Ryall v. Kennedy.....	486	Sanford v. Chase.....	201, 503
Ryan v. Cochran.....	298	Sandford v. Sandford.....	90
Ryan v. Mayor.....	480	Sandford v. White.....	174
Ryckman v. Coleman.....	597	Stackhouse v. Stobenbur...	179
Ryle v. Harrington.....	347	Sanger v. Seymour.....	834
R. & C. R. R. Co., Matter of..	277	Sanquirico v. Benedetti....	570
R. H. & L. R. R. Co. v. N. Y.,		Sares v. Matthews.....	769
L. E. & W. R. R. Co.....	205	Saril v. Payne.....	252

Sartos v. Merceques.....	531	Scott Shoe, etc., Co. v. Dancel	5
Sartwell v. Field.....	615	Scovill v. New.....	338
Savage v. Allen.....	542, 543, 560	Scoville v. Canfield.....	59
Savage v. City of Buffalo.....	445	Scott v. Beaudet.....	633
Savage v. Neeley.....	835	Scott v. Brown.....	810
Savage v. Relyea.....	274, 277, 278	Scott v. Elmendorf.....	41
Sawyer Lumber Co. v. Bissell	634	Scott v. Reid.....	489, 494
Saxton v. Dodge.....	38	Seaman v. Lee.....	579
Schackleton v. Hart.....	47, 51	Scaman v. Low.....	359
Schaefer v. Henkel.....	143	Seaver v. Hodgkin.....	466
Schell v. Lowe.....	309	Seaver v. Robinson.....	201
Schell, Matter of.....	33, 34	Secor v. Sturgis.....	403, 404, 405
Schenck v. McKie.....	287	Secor v. Weed.....	609
Schenke v. Rowell.....	302	Segelken v. Meyer.....	492
Schermerhorn v. Van Voast..	251	Seifert v. Caverly.....	288
Schieb v. Baldwin.....	657	Seiler v. Wilson.....	221
Schlessinger, Matter of.....	108	Seiser v. Mali.....	148
Schlichter v. South Brooklyn		Selby v. Hills.....	202
Saw M. Co.....	816	Selden v. Mann.....	579
Schmidt v. Gunther.....	146	Selden v. Vermilya.....	796
Schmidt v. Sellinger.....	845	Selser Bros. v. Potter & Co..	
Schoener v. Lissauer.....	96		633, 634, 637
Schofield v. Doscher.....	124	Selye v. Zimmer.....	471
Schoonmaker v. Brooks..	195, 196	Seneca Nat. etc. v. John..	550, 551
Schoonmaker v. Spencer.....	620	Seward v. Miller.....	428
Schrivver v. Schriver.....	185	Seward v. Torrence.....	435
Schroeder v. Gurney.....	178	Sewell v. Ives.....	147
Schroeder v. Lear.....	221, 224	Sexauer v. Bowen.....	343
Schuehle v. Reiman.....	317, 560	Seymour v. Dunham.....	450
Schuhardt v. Roth.....	296	Seymour v. Lake Shore, etc.,	
Schulhoff v. Co-operative Dress		R. R. Co.....	315
Association	353	Seymour v. Lorillard.....	415
Schulten v. Lord.....	609	Seymour v. McDonald.....	555
Schultz v. Cookingham.....	151	Seymour v. Mercer.....	513
Schultz v. Mead.....	124	Shaffer v. Holm.....	356
Schultz v. Schultz.....	485	Shale v. Schantz.....	811, 819
Schultz v. Third Ave. R. R. Co.		Shanks v. Magnolia Metal Co.	638
	372, 420	Shanks v. Rae.....	377
Schumaker v. Crossman.....	223	Shapiro v. Burns.....	136
Schumann v. Davis.....	668	Shattman v. Am. Credit	
Schunemann v. Paradise.....	500	Indem. Co.	53
Schuyler's Steam, etc., Co.,		Shattman v. Bascom.....	167
Matter of	855, 715, 722	Shaver v. McGraw.....	169
Schwab v. Wehrle.....	362	Shaw v. Cook.....	120, 366
Schwartz v. Livingston.....	288	Shaw v. Coleman.....	766
Schwartz v. Oppold.....	363	Shaw v. Coster.....	311
Schweizer v. Raymond.....	798	Shaw v. Dwight.....	561
Seofield v. Van Syckle.....	471	Shaw v. Lawrence.....	789

Shaw v. McNish.....	175	Shute v. Hamilton.....	456
Shaw v. Tobias.....	323	Sibley v. Waffle.....	52
Shayne v. Evening Post Co..	809	Sickles v. New Rochelle B'd. of Health	553, 569
Shearman v. Hart.....	269	Sickles v. Richardson.....	650
Shearman v. Hope.....	136	Siebrecht v. Siegel-Cooper Co.	447
Shearman v. N. Y. C. Mills...	609	Siefke v. Tappay.....	487
Sheehan v. Bradford, etc., R. R. Co.	202	Siegrist v. Halloway.....	275
Sheehan v. Carvalho.....	271	Silleck v. Heydrick.....	226
Sheehan v. Hamilton.....	166	Sill Stove Works v. Scott...	674
Sheehan v. Pierce.....	443	Silver v. Western Assur. Co...	209, 210
Sheldon v. Adams.....	365, 778	Silverman v. Baruth.....	315
Sheldon v. Heaton.....	429	Silvernail, Matter of.....	33
Sheldon v. Lake.....	404	Simar v. Cassidy.....	471
Sheldon v. Mirick.....	91	Simmons v. Craig.....	263
Sheldon v. Payne.....	21, 22	Simmons v. Kayser.....	454
Sheldon v. Wood.....	145	Simmons v. Vanderbilt.....	830
Shepherd, Matter of.....	523	Simmons v. Wood.....	726
Shepherd v. Moodhe.....	772	Simonds Mfg. Co., Matter of..	739, 742
Sheridan v. Andrews.....	239	Simons v. DeBare.....	469
Sheridan v. Houghton.....	52	Simonson v. Blake.....	419, 802
Sheridan v. Jackson.....	712	Simonson v. Nobis.....	105
Sheridan v. Mayor, etc.....	145	Simpson v. Burch.....	215
Sherman v. Boehm.....	382	Simpson v. The Jersey City Con. Co.....	648, 652
Sherman v. Felt.....	66	Simpson v. McKay.....	803
Sherman v. Gregory.....	164	Simpson v. Simpson.....	150
Sherman v. Inman S. S. Co..	474	Simpson, <i>ex parte</i>	386
Sherman v. Kane.....	85	Sims v. N. Y. Col. Dentistry.	187
Sherman v. McNitt.....	307	Simson v. Satterlee.....	175
Sherman v. Partridge.....	310	Sinclair v. Fitch.....	332
Sherman v. Wells.....	791	Siney v. N. Y. Con. Stage Co.	703, 726
Sherwood v. Barton.....	143	Singer v. Webber.....	388
Shiland v. Loeb.....	755	Singleton v. Home Ins. Co....	768
Shoe & L. Rep. Ass'n. v. Bailey	834	Sinnott v. First Nat. Bk....	277, 291
Shoemaker v. Benedict.....	116	Sisson v. Lawrence.....	295
Shook v. Daly.....	549	Sixth Ave. R. R. Co. v. Gilbert El. R. R. Co.....	265, 611
Short v. Barry.....	420	Sixth Ave. Ry. Co. v. Kerr...	576
Short v. May.....	291	Sizer v. H. & B. R. R. Co.	202, 210
Shotwell v. Smith.....	707	Skidmore v. Post.....	113
Shriver v. Shriver.....	84, 92	Skinner v. Noyes.....	265
Shubart v. Harteau.....	448	Skinner v. Steele.....	256
Shufelt v. Watrous.....	52	Skinner v. Stuart.....	614
Shuler v. Birdsall Mfg. Co...	254, 631	Skinner v. Tibbetts.....	166
Shuler v. Maxwell.....	44		
Shultz v. Hoagland.....	792		
Shultz v. Rodewald.....	382		
Shulz v. City of Albany.....	573		

Skinny v. Kelley.....	640	Smith v. Rathbun.....	
Slack v. Brown.....	755		148, 160, 370, 378
Slack v. Heath.....	325	Smith v. Reid.....	92, 186
Slade v. Joseph.....	203	Smith v. Rockwell.....	755
Slade v. Montgomery.....	447, 448	Smith v. Ryan.....	116
Slater v. Wood.....	24	Smith v. Schulting.....	473
Slauson v. Conkey.....	766	Smith v. Tiffany.....	150, 175
Slocum v. Barry.....	159	Smith v. Town of Greenwich..	94
Sloman v. Schmidt.....	398	Smith v. Tracy.....	489
Sluyter v. Smith.....	780, 794	Smith v. Wells.....	704
Smadbeck v. Sisson.....	637	Smith, etc. v. Wilson.....	643
Smart v. Bement.....	175	Smith v. Woodruff.....	130, 722
Smart v. Haring.....	187	Smith v. Zalinski.....	817, 823, 827
Smiley v. Fry.....	112	Smith Co., Matter of.....	725, 749, 750
Smith v. American Coal Co..	648	Smoot v. Heim.....	658
Smith v. Arnold.....	634, 635	Smyth v. Rowe.....	226
Smith v. Barnes.....	41	Snape v. Gilbert.....	345
Smith v. Bowers.....	774	Snedecker v. Bernard.....	381
Smith v. Button.....	122	Snow v. Fourth Nat. Bk....	480
Smith v. City of Brooklyn..	580	Snow v. Williams.....	565
Smith v. Camp.....	115	Snyder v. Olmsted.....	253, 848
Smith v. City of Rochester..	42	Snyder v. Snyder.....	145
Smith v. Countryman.....	387	Snyder v. White.....	362, 363
Smith v. Crocker.....	57	Soc. of 1812 v. Soc. of 1812 in	
Smith v. Danzig.....	735	N. Y.	575
Smith v. Davis.....	178, 364	Solomon v. Belden.....	305, 306
Smith v. Douglass.....	397	Solomon v. Bennett.....	103
Smith v. Emigrant, etc., Bk..	70	Somers v. Torrey.....	386
Smith v. Fleischmann.....	271	Somerset & W. Sav. Bk. v.	
Smith v. Geortner.....	416	Huyck	528
Smith v. Gold & Stock Tel Co.	550	South In'l. Nav. & Imp. Co. v.	
Smith v. Hall.....	434, 459	Sherwin.....	484, 518, 779
Smith v. Heermance.....	789	South Pub. Co. v. Fire Assoc.	
Smith v. Holt.....	636	of Phila.	210
Smith v. Howard.....	419	Southwick v. First Nat. Bk..	
Smith v. Hudson.....	792		347, 370, 372
Smith v. Joyce.....	830	Soverhill v. Dickson.....	133
Smith v. Kelley.....	708	Spalding v. Vandercook.....	758, 760
Smith v. Kerr.....	768	Spaulding v. Lyon.....	213
Smith v. Keteltas.....	199	Spang v. Patterson.....	511
Smith v. Levinus.....	395	Spawn v. Veeder.....	359
Smith v. Long.....	167	Spear v. Cutter.....	578, 579
Smith v. Lowry.....	562	Spears v. Matthews.....	581, 611
Smith v. Meyers.....	504	Spears v. Mayor.....	373
Smith v. N. Y. Con. Stage Co.	699	Spellman v. Weider.....	467
Smith v. Orser.....	410, 646	Spence v. Baldwin.....	491
Smith v. Randall.....	452	Spencer v. Babcock.....	332

Spencer v. Barber.....	267, 801	Steele v. Sturgis.....	715
Spencer v. Rogers Loco. Wks.	683	Stegman v. Hollingsworth....	457
Spencer v. Tooker.....	437	Steinback v. Diepenbrock.....	429
Spencer v. Wheelock.....	163	Steinberg v. Lasker.....	485
Sperry v. Hellman.....	511	Steiner v. East Riv. Sav. Inst.	313
Speyers v. Torstritch.....	844	Steinert, Matter of.....	606
Sperry v. Reynolds.....	43	Steinhardt v. Baker.....	215
Spier v. Robinson.....	161	Steinle v. Bell.....	228
Spies v. Munroe....	320, 321, 322	Stemmler v. The Mayor, etc..	778
Spliss v. Meyer.....	173	Sterman v. Kennedy.....	569
Spofford v. Rowan.....	442	Stern v. Knapp.....	367, 794
Spooner v. Keeler.....	812, 831	Sternberger v. McGovern.....	81
Spotts v. Dumesnig.....	788	Sterne v. Bentley.....	771
Sprague v. Irwin.....	195	Sterne v. Herman.....	411
Spratt v. Huntington.....	262	Steuben Co. Bk. v. Alberger..	
Spring v. Gourlay.....	519	254, 272, 607, 633, 638, 674, 675,	
Springer v. Dwyer.....	442	676, 681	
Sproull v. Star Co.....	284	Stevenbergh v. Schoolcraft... 133	
Spuyten Duyvil R. M. Co. v.		Stevens v. Browning.....	782
Williams.....	363	Stevens v. Cent. Nat. Bk....	559
Squire v. McDonald.....	44, 511	Stevens v. Hauser.....	35
S. S. Circassin, Matter of....	24	Stevens v. Lockwood.....	404
Staats, <i>ex parte</i>	33	Stevens v. Mayor, etc.....	419
Stackhouse v. Stobenbur....	179	Stevens v. Middleton. 613, 634, 636	
Stafford v. Ambs.....	277, 752	Stevens v. Orton.....	478
Stafford v. Bryan.....	115	Stevens v. Union Tr. Co.....	161
Stage v. Stevens.....	488	Stevens v. Veriane.....	768
Stage Horse Cases.....	576	Stevenson v. N. Y. L. Ins.	
Stamm v. Bostwick.....	394	Assoc.	311
Stanton v. Friedman.....	838	Stevenson v. York.....	760, 761
Stanton v. Swann.....	374	Steward v. Winters.....	554
Stanton v. Mo. Pac. R. R. Co.		Stewart v. Berge.....	280
417, 473		Stewart v. Howard.....	504, 508
Staples v. Fairchild.....	253	Stewart v. Lyman....	617, 643, 677
Staples v. Parker.....	284	Stewart v. Patrick.....	168
Star F. Ins. Co. v. Godet....	278	Stewart v. Steck.....	45
Starks v. Starks.....	783	Stewart v. Stewart.....	39
Starr v. Rathbone.....	706	Stewart v. Wallis.....	460
State Bank v. Gill.....	257, 701	Stichter v. Tillinghast... 833, 840	
State Bank v. Shaw.....	464	Still v. Holbrook.....	101
Stat. Is. Elec. Ry. Co. v. King	542	Stilwell v. Carpenter.....	395
Staub v. Meyers....	484, 487, 516	Stilwell v. Kelly.....	362
Staunton v. Swann.....	378	Stilwell v. Priest.....	839
Steamship Richmond Hill Co.		Stilwell v. Stilwell.....	722
v. Seager.....	195, 493, 523	Stinerville, etc., Co. v. White.	41
Stedeker v. Bernard..	165, 344, 367	Stoker v. Watters.....	115
Stedeker v. Taft.....	342	Stokes v. Hagar.....	381
Steel v. Raphael.....	637	Stokes v. Hoffman House....	724

Taylor v. L. I. R. R. Co.....	34	Thompson v. Sherrard.....	712
Taylor v. Mayor, etc.....	449	Thompson v. Smith.....	151
Taylor v. Mayor of N. Y.....	284	Thompson v. Tammany Soc.	550
Taylor, Matter of.....	533	Thompson v. Whitmarsh...152,	452
Taylor v. Metropolitan Elev.		Thompson v. Sanders.....	445
R. R. Co.....	465	Thorington v. Merriek...617,	636
Taylor v. Richards.....	464	Thorne v. Newby.....	178
Taylor v. Root.....	448	Thorp v. Adams.....	201
Taylor v. Troncoso.....	627	Thorp v. Carvalho.....	407
Taylor v. Van Keuren.....	500	Throop v. Hatch.....	323
Teall v. City of Syracuse....	413	Throop Grain Cleaner Co. v.	
Teall v. Felton.....	55	Smith	664
Tebo v. Robinson.....	115	Thurber, Matter of.....	301
Teets v. Throckmorton.....	457	Thursby v. Mills.....	581
Ten Eick v. Simpson.....	779	Thwing v. Thwing.....	824
Ter Kuile v. Marsland.....	445	Tibbetts v. Blood.....	147
Terry v. Rubel.....	834	Tiffany v. Bowerman.....	374
Thames & Mersey Mar. Ins.		Tiffany v. Lord.....	41
Co. v. Dimick.....	620, 637	Tiffany v. U. S. Illum'g. Co.	
T. H. E. Co. v. D. L. I. Co..	446	556, 565	
Thalheimer v. Hays.....	680	Tift v. Bloomberg.....	373
Tharp v. Heyman.....	779	Tighe v. Pope.....	780
Thayer v. Roch. City & B. R.		Tilden v. Aitkin.....	36
R. Co.	565, 599	Tillspaugh v. Dick.....	791
Thayer v. Roch. Co. & c. R. R.		Tilman v. Keane.....	775
Co.	610	Tilton v. Beecher...276, 354,	388
Third Ave. R. R. Co. v. Mayor,		Tilton, Matter of.....	644
etc.	559	Tilton v. Vail.....	171
Thoesen & Bro., Matter of...	317	Tioga R. R. Co. v. B. & C. R.	
Thomas v. Bennett.....	159	R. Co.	103
Thomas v. Harmon.....	74	Titus v. Cortelyou.....	849
Thomas v. Jones.....	233	Titus v. Poole.....	118
Thomas v. Loaners' Bank....	458	Tobin v. Cary.....	787
Thomas v. Nelson.....	372	Toll v. Alvord.....	535
Thomas v. Utica & c. R. R. Co.	415	Toll v. Cromwell.....	394
Thomas v. Wilson.....	134	Tom v. Methodist Ep. Ch....	206
Thompkins v. Smith.....	521	Tompkins v. Ives.....	771
Thompson v. Burhans.....		Tompkins v. Smith.....	487
86, 87, 88,	252	Tooker v. Arnoux.....	329, 369
Thompson v. Clark.....	242	Toomey v. Andrews.....	362
Thompson v. Denner.....	737	Toplitz v. Raymond.....	790
Thompson v. Erie Ry. Co....		Town of Essex v. N. Y. &	
265, 271, 428, 839,	843	Canada R. R. Co.....	386
Thompson v. Friedberg...509,	514	Town of Gravesend v. Curtiss.	569
Thompson v. Halbert.....	476	Town of Guilford v. Cornell..	599
Thompson v. Hickey.....	576	Town of Hancock v. First Nat.	
Thompson v. Hodgkin.....	577	Bank	181
Thompson v. McGregor.....	714	Town of Thompson v. Norris.	559

Town of Venice v. Breed....	94	Troxell v. Haynes.....	605
Townsend v. Auld.....	336	Trubee v. Alden.....	667
Townsend v. Coon.....	415	Trumbell v. Ashley.....	429
Townsend v. Frommer.....	36	Truscott v. Dole.....	325
Townsend v. Lawrence.....	833	Trustees v. Cowen.....	555
Townsend v. Nebenzahl.....	19	Trustees, etc. v. Matteson....	578
Townsend v. Platt.....	437	Trustees of Columbia Col. v. Lynch	554
Townshend v. Norris.....	324	Trustees of Columbia Col. v. Thacher	555
Townshend v. Townshend....	174	Trustees of Delhi v. Youmans	580
Towsley v. McDonald....	219, 225	Trustees of East Hampton v. Kirk	86
Tracy v. Baker.....	431	Trustees of Watertown v. Cowen	180
Tracy v. First Nat. Bk. of Selma	673	Tuchband v. C. & A. R. R. Co.	208
Tracy v. Reynolds.....	235, 423	Tuck v. Manning.....	45, 645
Tracy v. Veeder.....	514	Tucker v. Goodsell Co....	254, 632
Tradesman's Nat. Bk. v. Mc- Feely	783	Tucker v. Manhattan R. Co..	436
Tradesman's Nat. Bk. v. U. S. Trust Co.	386	Tuers v. Tuers.....	404
Traver v. Eighth Ave. R. R. Co.	348, 396	Tuft v. Braisted.....	122
Travis v. Myers.....	160, 296	Tuller v. Beck.....	627, 628
Travis v. Tobias.....	314, 424	Tullis v. Runkle.....	45, 50
Travis v. Travis.....	301	Tunstall v. Winton.....	495
Treadwell v. Fassett.....	344, 345	Tuomy v. Dunn.....	787
Treadwell v. Lawlor.....	189, 623	Turner v. Davis.....	39
Treadwell v. United Verde C. Co.	549	Turner v. Fire Ins. Co. of Phila.	208
Temper v. Wright.....	289	Turner v. Honsinger.....	774
Trepagnier, etc. v. Rose....	651	Turner v. Thompson.....	607
Tribune Asso. v. Eisner, etc., Co.	684	Turtle v. Turtle.....	259, 260
Tribune Asso. v. Sun Print. Asso.	567	Tuthill, Matter of.....	76
Trier v. Hermann.....	769	Tuttle v. Smith.....	396
Trigg v. Hitz.....	311	Tyack v. Bromley.....	567
Trimmer v. Rochester.....	95	Tylee v. M'Lean.....	162
Tripp v. Saunders.....	770	Tyng v. American Surety Co.	642
Trolan v. Fagan.....	213		
Trowbridge v. Didier.....	333		
Trow's Printing Co. v. Hart.. 674, 677			
Troy & Boston R. R. Co. v. B. H. T. & W. R. R. Co.....	544, 545, 577		
Troy & B. R. R. Co. v. Tib- bits	366, 377		
Troy Sav. Bk. v. Morrison....	719		
		U.	
		Uhl v. Loughran.....	186
		Uhlfelder v. Tamsen.....	142
		Ulner v. Butterfield.....	105
		Underhill v. Dennis.....	14
		Underhill v. Phillips.....	123
		Underwood v. Sutcliff.....	797
		Union Con. Mining Co. v. Raht	517, 681

Union Dime Sav. Inst. v. Anderson	26	Van Camp v. Searle.....	655
Union Ferry Co., Matter of..	809	Vandenburgh v. Van Rensselaer	802
Union Hardware Co. v. Flagler	352	Vanderbilt v. Bleeker.....	364
Union Nat. Bk. v. Bassett.	366, 778	Vanderbilt v. Schreyer...	177, 797
Union Paper Collar Co. v. Metropolitan Collar Co....	843	Vanderheyden v. Gary...	242, 661
Union Tr. Co. v. Driggs..	285, 845	Van Der Zee, Matter of.....	96
United States v. Graff.	56, 615, 645	Van Deusen v. Brower.....	782
United States v. Kirby.....	501	Van Deusen v. Young.....	180
United States v. Reid.....	484	Van Deventer v. Van Deventer	406
United States v. Reynes....	323	Van Slyck, Matter of.....	96
United States v. Dodge.....	56	Van Dyck v. McQuade.....	745
United States v. Lee.....	57, 60	Van Horn v. Kithitas Co....	650
United States v. Lathrop....	59	Van Horne, Matter of.....	709
U. S. Life Ins. Co. v. Poillon.	124	Van Ingen v. Snyder.....	114
U. S. Mort. & Tr. Co. v. Hodgson	771	Van Kleek v. Nichols.....	520
United States Trust Co v. N. Y., West Sh. & Buff. R. R. Co..	733, 734, 735, 737, 744, 750	Van Leuven v. Lyke.....	399
Upton v. Elec. Const. Co.....	695	Van Liew v. Johnson.....	474
Utica Ins. Co. v. Lynch.....	724	Van Name v. Van Name..	175, 408
V.		Van Namee v. People.....	392
V, Matter of.....	32	Van Olinda v. Hall.....	354
Vail v. Knapp.....	558	Van Pelt v. Boyer.....	423
Vail v. Lane.....	288	Van Ranst v. N. Y. College of Vet. Surgeons	543
Valentine v. McCue.....	785	Van Reed v. People's Nat. Bk.	619
Valentine v. Myers Sanitary Depot	230, 233	Van Rensselaer v. Brice.....	385
Valerino v. Thompson.....	57	Van Rensselaer v. Chadwick..	290
Van Aernam v. McCune.....	146	Van Rensselaer v. Dunbar...	219
Van Allen v. Glass.....	769	Van Rensselaer v. Hopkins...	538
Van Allen, Matter of.....	721	Van Rensselaer v. Layman...	420
Van Allen v. Sampson.....	682	Van Rensselaer v. Sheriff of Onondaga Co.....	36
Van Alstyne v. Erwine....	621, 638	Van Rensselaer v. Wright....	90
Van Arsdale v. Drake.....	171	Van Schaick v. Siegel.....	488
Van Arsdale v. King.....	15	Van Slyke v. Schmeck.....	788
Van Benschoten v. Yaple....	438	Van Syckels v. Perry.....	365
Van Benthuyssen v. Stevens...	251	Van Valen v. Lapham.....	443
Van Beuren, Matter of.....	122	Van Veghten v. Howland..	540, 544
Van Buren v. Chenango Co.		Van Vleck v. Enos.....	167
Mut. Ins. Co.....	751	Van Wagenen v. Botsford....	179
Van Buskirk v. Roy.....	313	Van Wagenen v. LaFarge....	561
		Van Wagonen, Matter of...	12, 183
		Van Wyck v. Hardy.....	221, 792
		Van Wyck v. Horowitz.....	575
		Varick v. Edwards.....	102
		Vassar v. Livingston.	439, 440, 441
		Varick v. Smith.....	155

Veeder v. Baker.....	272	Wagner v. Perry.....	244
Vieller v. Oppenheim.....	836, 839	Wakeman v. Sherman....	115, 117
Velic v. Newark City Ins. Co.	399	Walden v. Davison.....	21
Vellerman v. King.....	771	Walkenshaw v. Perzel....	361, 781
Vermilyea v. Vermilyea.....	547	Wacker v. A. C. Ins. Co....	440
Vernon v. Palmer.....	196	Walker v. Devereaux.....	545
Vernum v. Wheeler.....	579	Walker v. Fowler.....	385
Verplanck v. Kendall.....	282	Walker v. Granite Bank....	
Verplanck v. Mercantile Ins.			843, 844, 846
Co.	718, 744	Walker v. Hubbard..	191, 392, 779
Versann v. McGregor.....	428	Walker v. Isaacs.....	782
Vessett v. Marx.....	316	Walker v. Johnson.....	771
Victor v. Lewis.....	545	Walker v. Reiff.....	225
Victory v. Krauss.....	812, 813	Walker v. Wainwright.....	502
Vietor v. Henlein.....	623, 679	Wall v. Beach.....	142
Viets v. Union Nat. Bank...	113	Wall v. Buffalo Water Wks...	
Vilas v. P. & M. R. R. Co.	43, 232		347, 348
Village of Brockport v. John-		Wall, <i>ex parte</i>	31, 32
son	553, 573	Wallabout Bank v. Military	
Village of Little Falls v.		Club	622
Cobb	473	Wallace v. Amer. Lin. Thread	
Vincent v. King.....	365	Co.	774
Vincent v. Parker.....	721	Wallace v. Baring.....	263
Volkening v. DeGraaf....	370, 371	Wallace v. Bennett.....	330
Von Moppes v. Leimbach....	633	Wallace v. Castle..	490, 491, 613
Von Rhade v. Von Rhade....	223	Wallace v. Dimmick..	191, 192, 779
Von Sachs v. Kietz.....	108	Wallace v. Eaton.....	472
Von Schoening v. Buchanan..	793	Wallace v. Morss.....	500
Vorhis v. Childs.....	152	Wallace v. Murphy.....	488
Vosburgh v. Huntington....	311	Wallack v. Society for Relief	
Vrooman v. Stimson.....	151	of Juv. Delinquents.....	560
		Waller v. Lyon.....	332
		Wallis v. Lott.....	212, 213
		Walmsley v. Horton & Co.	270, 814
		Walmsley v. Nelson.	833, 841, 847
		Walradt v. Maynard.....	40
		Walrath v. Killer.....	263
		Walsh v. Press Co.....	843
		Walsh v. Washington Ins. Co.	158
		Walter v. Bennett.....	399
		Walter v. DeGraef.....	42
		Walter v. Lockwood.....	321
		Walther v. Regnault.....	171
		Walton v. Daly.....	685
		Walton v. Fairchild.....	39
		Walton v. James.....	176
		Walts v. Nichols.....	
			276, 617, 634, 674

W.

Wade v. Delayer.....	793
Wade v. Kalbfleisch.....	812
Wadley, Matter of.....	9, 249
Wadsworth v. Georger.....	191
Waeber v. Rosenstein.....	704
Waffle v. Gobble.....	221, 626
Waffle v. Vanderheyden.....	234
Wait v. Ferguson.....	476
Wait v. Getman.....	379, 381
Waite v. Kaldenberg Co....	767
Waite v. Saybel.....	332
Wager v. Troy Union R. R. Co.	168
Waggoner v. Brown.....	343
Wagner v. Hodge.....	176

Wandell v. Edwards.....	433, 438	Weatherby v. Wood.....	578
Wannemacher v. Davis.....	507	Weaver v. Barden.....	432
Ward v. Arredondo.....	57	Weaver v. Haviland.....	95
Ward v. Barber.....	795	Webb v. Bailey.....	513, 629
Ward v. Comegys.....	453	Webb v. Groom.....	274
Ward v. Kalbfleisch.....	363	Webb v. Overmann.....	712
Ward v. N. Y. Life Ins. Co..	838	Webb v. Vanderbilt.....	467, 474
Ward v. Petrie.....	469	Webb v. Van Zandt.....	705
Ward v. Reynolds.....	817	Weber v. Boyer.....	202
Ward v. Roy.....	40	Weber v. Fowler.....	240
Ward v. Sands.....	43, 192	Weber v. H. M. S. R. R. Co..	98
Ward v. Smith.....	102	Weed v. Calkins.....	124
Ward v. Stringham.....	393, 779	Weed v. Hornby.....	176
Ward v. Ward.....	464	Weed v. H. B. F. Ins. Co....	158
Ward v. Whitney.....	670	Weed v. Saratoga & S. R. R. Co.	777
Waring v. Indemnity F. Ins. Co.	158	Weeks v. Keteltas.....	347
Waring v. Waring... 238, 243,	827	Weeks v. Love.....	149
Waring v. Yale.....	266	Weeks v. Tomes..... 238, 796	
Warner v. Babcock.....	769	Wehle v. Bowery Sav. Bk. 310,	311
Warner v. Fourth Nat. Bk... 652		Wehle v. Conner.... 645, 646,	652
Warner v. Schweiter.....	827	Wehle v. Loewe.....	386
Warner v. Warner.....	189	Weichnell v. Spear.....	279
Warren v. Sprague.....	713	Weidman v. Sibley.....	
Warren v. Tiffany.....	218		73, 232, 233, 804
Warsaw Water Works Co. v. Warsaw	608	Weil v. Martin.....	
Washburn v. Carthage Nat. Bk.	535, 536		181, 191, 192, 193, 780
Washburn v. Cope..... 43, 232		Weill v. Weill.....	51
Waterbury v. Delafield.....	307	Weir v. Slocum.....	780
Waterbury v. Eldridge..... 33, 34		Weitkamp v. Loehr.....	618
Waterbury v. Merch. Un. Ex. Co.	711	Welch v. Cochran.....	42
Waterbury v. Mut. U. Ex. Co. 146		Welch v. Platt.....	403
Waterbury v. Westervelt....	21	Welch v. Winterburn.... 486,	519
Waters v. Waters.....	227	Welford v. Oakley.....	805
Watertown Paper Co. v. West	355	Wellington v. Claason... 165,	234
Watson v. Church.....	203	Wells v. Chapman.....	554
Watson v. Cowdrey.....	455	Wells v. Henshaw.....	122
Watson v. McGuire.....	489	Wells v. Nat. City Bk.....	311
Watt v. Healy.....	524	Wells v. Van Aken..... 351,	352
Watts v. Nichols.....	251	Wendell v. Van Rensselaer... 140	
Watts Admr. v. Kinney.....	58	Wendling v. Pierce.....	332
Waverly Water Works, Mat- ter of	279	Wendt v. Peyser..... 335,	339
Way Mfg. Co. v. Corn.....	358	Wenzell v. Morrissey.....	615
Wayland v. Tysen... 381, 382,	383	Wertheim v. Clergue.....	57
		Wesley v. Bennett	381
		Wessels v. Boettcher.....	282
		West v. Amer. Ex. Bk.....	
			427, 428, 432

West v. Kurtz.....	36	Whiting v. Barney.....	54
Westcott v. Fargo.....	146	Whiting v. Mayor, etc.....	480
Western R. R. Co. v. Nolan..		Whitlake v. Fidelity Co.....	426, 427
	567, 569, 572	Whitman v. Haines.....	21
Westervelt v. Ackley.....	435	Whitney v. Belden.....	275
Westervelt v. Ag., etc., Soc..		Whitney v. Coapman.....	151
	615, 617, 636	Whitney v. Davis.....	664
Westheimer v. Schultz.....	584	Whitney v. De La Rionda....	91
West Point Iron Co. v. Rey-		Whitney v. Denniston.....	641
mert	576	Whitney v. Hirsch....	616, 634, 680
West Side Bk. v. Meehan....	679	Whitney v. Hoffstadt.....	509
West Side Bk. v. Pugsley....	281	Whitney v. Hoggarty.....	287
Weston v. Cits. Nat. Bk....	202, 210	Whitney v. Mayor, etc.....	553
Wetmore v. Hegeman....	36, 375	Whitney v. N. Y. & Atlantic	
Wetmore v. Jennys.....	360	R. R. Co.....	736
Wetmore v. Porter.....	151, 399	Whitney v. Townsend.....	297
Wetmore v. Scovell.....	571	Whiton v. Morning Journal	
Wetter v. Schlieper.....	702	Association.....	226, 800
Weyh v. Boylan.....	817	Whittlesey v. Delaney.....	746
Wharton v. Barry.....	257	Whitworth v. Erie R. R. Co..	843
Wheaton v. Fay.....	536	Wice v. Com'l. Ins. Co.....	183
Wheeler v. Brady.....	517	Wicker v. Harmon.....	506
Wheeler v. Dixon.....	338	Wicker v. Village of Elmira	
Wheeler v. Gillsey.....	592	Heights	254, 631
Wheeler v. Hall.....	370	Wicks v. Monihan.....	147
Wheeler v. N. Y. & Har. R. R.		Widmer v. Greene.....	549
Co.	212, 213	Wier v. Slocum.....	192, 286
Wheeler v. Spinola.....	88	Wigand v. Dejonge.....	12, 354
Wheeler v. Warner.....	112	Wiggins v. Richmond....	192, 780
Wheelock v. Lee.....	233, 480, 804	Wilcox v. Daggett.....	374
Wheeler v. Stewart.....	491	Wilcox & Gibbs, etc., Co. v.	
Wheelock v. Tanner.....	755	Kruse & Murphy Mfg. Co..	58
Whelan v. Whelan.....	137	Wilcox v. Wilcox.....	67, 68
Whelpley v. Van Epps.....	343	Wilder v. Ballou.....	108
Whipple v. Williams.....	801	Wilder v. Guernsey.....	521
Whitcomb v. Salsman.....	489	Wildman v. Gelder.....	623
White v. Bogart.....		Wiles v. Suydam.....	411, 472
	214, 770, 773, 784	Wiley v. L. I. R. R. Co.....	269
White v. Buloid.....	821	Wilkes v. Hotchkiss.....	257
White v. Caxton Book Bd'g		Wilkie v. Roeh. & St. Line R.	
Co.	559	R. Co.....	609
White v. Coulter.....	242, 803	Wilkin v. Raplee.....	459
White v. Munroe.....	271	Wilkins v. Williams.....	74
White v. Reichert.....	631	Wilkinson v. First Nat. F. Ins.	108
Whitehead v. Kennedy.....	45	Wilkinson v. Johnson.....	305
Whitelegge v. DeWitt.....	675	Wilkinson v. Parish.....	817
Whiteside v. Prendergast....	727	Willard v. Judd.....	253
Whitewright v. Stimpson....	706	Willet v. Equitable Ins. Co..	650

Willet v. Fayerweather.....	271	Winchester v. Browne.....	57
Willett v. Slinger.....	598	Windecker v. Mut. Life Ins.	
Williams v. Allen.....	360	Co.	313, 460
Williams v. Aryault.....	558	Winfield v. Bacon....	131, 720, 722
Williams v. Davis.....	359	Wing v. Bull.....	472
Williams v. Estate of Cameron		Wing v. Ketcham.....	818, 827
	132, 133	Wing, Matter of.....	133
Williams v. Fitch.....	52	Wingrove v. Ger. Sav. Bk...	792
Williams v. Hayes...	319, 373, 398	Winnebrenner v. Edgerton..	
Williams v. Hogeboom.....	781		802, 803
Williams v. Ingersoll.....	47	Winslow v. Ferguson....	382, 383
Williams v. Johnson.....	791	Winslow v. S. I. R. T. R. R.	
Williams v. Lakey.....	746	Co.	205
Williams v. Lindblom.....	430	Winter v. Baker.....	59
Williams v. Matthews.....	35	Winterton v. Winterton....	117
Williams v. Murray.....	275	Wireman v. Remington S. M.	
Williams v. Rightmyer.....	638	Co.	764, 766
Williams v. Rogers.....	781	Wisner v. Cons. Fruit Jar. Co.	
Williams v. Shaw.....	358		421, 475
Williams v. Van Valkenburgh	200	Witherbee v. Witherbee.....	719
Williams v. Willis.....	117	Witherhead v. Allen.....	474
Williams v. W. U. Tel. Co. 262,	549	Witkowski v. Paramore....	353
Williamson v. Williamson....	221	Wittner v. Von Minden.....	616
Williamson v. Moore.....	819	W. J. Johnson Co. v. Hunt..	570
Willink v. Renwick.....	280	Woerishoffer v. North Riv.	
Willis v. Chipp.....	437	Con. Co.	728
Willis v. Corlies.....	732	Wolfe v. Burke.....	561, 576
Willover v. First Nat. Bk. of		Wolfe v. Goulard.....	574
Olean	452	Wolford v. Oakley.....	187, 779
Willson v. Betts.....	90	Wolff v. Kaufman.....	257, 357
Wilmont v. Meserole.. 30, 33,	238	Wood v. Furtick...	230
Wilmore v. Flack.....	777, 791	Wood v. Holmes.....	286
Wilson v. Allen.....	715	Wood v. Marvine.....	572
Wilson v. Barney.....	737	Wood v. Mayor.....	379
Wilson v. Bennett.....	338, 345	Wood v. St. Louis B. & I. Co..	222
Wilson v. Blanco.....	203	Wood v. Wood.....	102, 167
Wilson v. Britton.....	622	Wood v. Young.....	113
Wilson v. Doran.....		Woodbury v. Deloss.....	413
	755, 757, 758, 759, 760, 762	Wooden v. Strew.....	386
Wilson v. Duncan.....	311	Woodhouse v. Woodhouse....	453
Wilson v. Fowler.....	369	Woodmansee v. Rogers.....	676
Wilson v. Harter.....	827	Woods v. DeFiganieri.....	
Wilson v. Harvey.....	617		139, 147, 847
Wilson v. Lawrence.....	376	Woolsey v. Judd.....	55, 571
Wilson, Matter of.....	47	Woodward v. Frost.....	305, 561
Wiltzie v. Northam.....	454	Woodward v. Musgrave.....	270
Winchell v. Hicks.....	115	Woodward v. Schatzell.....	496
Winchell v. Martin.....	356	Woodward v. Stearns.....	640

Woodworth v. Van Buskerk..	562	Yellow Pine Co. v. Atlantic	
Wooley v. Newcombe.....	321	Lumber Co.....	787
Wooster v. Bateman.....	256, 266	Yenney v. Yenney.....	223
Wooster v. Case.....	306	Yorks v. Peck.....	35
Wooster v. 42d St. R. R. Co..	108	Younger v. Duffie.....	386
Wortman v. Wortman.....	225	Young v. Campbell.....	541
Woven Tape Skirt Co., Matter		Young & Fletcher Co. v. Wels-	
of	750	bach Light Co.....	208
Wright v. Bennett.....	200	Young v. Fowler.....	221, 227
Wright v. Hooker.....	396	Young v. Nassau Elec. R. Co.	135
Wright v. Marshall.....	162	Youngs v. Carter.....	66
Wright v. Robinson & Co..	756, 757	Youngs v. Kent.....	379, 380
Wright v. Rowland.....	684	Youngs v. Perry.....	328
Wurtz v. Jenkins.....	150	Youngs v. Ransom.....	566
Wyckoff v. Anthony.....	756	Youngs v. Seeley.....	339
Wyckoff v. Devlin.....	124		
Wyckoff v. Scofield..	708, 717, 720		

Z.

X.		Zabriskie v. N. Y. Sav. Bk..	312
Xenia Branch Bk. v. Lee..		Zabriskie v. Smith..	322, 471, 481
		Zacharias v. French.....	439
Y.		Zellenkoff v. Collins.....	578
Yate v. Willan.....		Zerega v. Benoist.....	631
Yates v. Bigelow.....		Ziegler v. Hoagland.....	316
Yates v. Blodgett.....		Zimm v. Ritterman.....	527
Yates v. Burch.....		Zimmerman v. Meyrowitz....	389
Yates v. North.....		Zinn v. Ritterman.....	487
Yates v. Olmstead.....		Zoellner v. Newberger.....	339
		Zorn v. Zorn.....	416, 472
		Zweigle v. Hohman.....	95, 101

CODE OF CIVIL PROCEDURE.

SEC.	PAGE.	SEC.	PAGE.
2.....	2	102.....	24
4.....	60, 703	103.....	23, 24
5.....	4	104.....	23
6.....	4, 15	108.....	668
14.....	24, 27	111.....	523, 524
17.....	2	116.....	184
18.....	2	119.....	503
22.....	331	158.....	199
27.....	16	172.....	27
34.....	10	173.....	28
35.....	11	174.....	28
36.....	12	175.....	28
37.....	9	176.....	28
46.....	12, 14	179.....	28
47.....	15	180.....	28, 513
48.....	15	181.....	28
49.....	15	182.....	25
56.....	29, 30	183.....	25
59.....	29	184.....	25, 26
60.....	29	185.....	26
61.....	20	186.....	25
62.....	22	190.....	62, 313, 353
63.....	37	191.....	63
65.....	38, 286	196.....	7
66.....	45, 46, 50	197.....	7
67.....	30, 31	217.....	66
68.....	30	218.....	67
69.....	33	220.....	7, 65
70.....	35	221.....	16
71.....	35	225.....	7
72.....	35	226.....	7
73.....	33, 35, 36, 37	232.....	8, 16
74.....	33, 36, 37	234.....	8
75.....	33, 37	235.....	65, 77
76.....	37	237.....	9
77.....	37	238.....	9
89.....	16, 20	239.....	9, 249
90.....	698	241.....	77
92.....	25	242.....	25
97.....	25	263.....	4
98.....	25	266.....	16
99.....	25	268.....	11
100.....	23	270.....	87
101.....	24	281.....	4

SEC.	PAGE.	SEC.	PAGE.
315.....	69	393.....	111
316.....	70	394.....	98
317.....	70	395.....	114
318.....	70	396.....	110
319.....	67	397.....	114
324.....	10	398.....	119
327.....	71	399....25, 106, 119, 120, 628, 629	
338.....	71	400.....	120
340.....	72	401.....	104
341.....67, 73		402.....	106
343.....	67	403.....	107
347.....	73	404.....	105
348.....	73	405.....	108
349.....	77	406.....	108
350.....	75	407.....	112
354.....	78	408.....89, 110	
355.....10, 77		409.....	110
362.....	82	410.....	112
363.....	83	411.....	109
365.....83, 84		412.....	109
366.....	84	413.....117, 434, 460	
367.....	85	414.....108, 118	
368.....	85	415.....	111
369.....	85	416.....189, 614, 626, 827	
370.....86, 87		417.....191, 230, 392	
371.....	87	418.....	193
372.....	87	419.....193, 422, 423	
373.....	89	420.....	194
374.....	89	421.....230, 232	
375.....	89	422.....	235
376.....90, 91, 107		423.....	197
377.....	91	424.....231, 629	
378.....	91	425.....	198
379.....84, 92		426.....198, 199, 200	
380.....	107	427.....	199
381.....	92	428.....	199
382.....92, 93, 114		430.....104, 204, 630	
383.....	98	431.....	205
384.....	99	432.....104, 207, 208, 210	
385.....	100	433.....	211
386.....	111	434.....211, 213	
387.....	101	435.....214, 215, 237, 628	
388.....	101	436.....	216
389.....	103	437.....217, 629	
390.....	103	438.....217, 218	
391.....	105	439.....	219
392.....	106	440.....	223

SEC.	PAGE.	SEC.	PAGE.
441.....	227	492.....	425, 463, 466, 467
442.....	225, 226, 800	493.....	463, 466, 478
443.....	225, 226	494.....	449, 463, 466, 476
444.....	228	495.....	459, 463, 477, 478
445.....	228, 229	496.....	465, 466, 478
446.....	139	497.....	479
447.....	139, 140, 155	498.....	417, 425, 436, 466, 481
448.....	139, 140, 159	499.....	417, 436, 466, 471, 474, 479, 481
449.....	139, 140, 157, 158	500.....	320, 324, 426
451.....	181, 191	501.....	439
452.....	140, 142, 163	502.....	449, 451
453.....	193	503.....	455
454.....	165, 414	505.....	451
455.....	164, 165	506.....	451, 452
456.....	164, 165	507.....	331, 436, 454
457.....	165	508.....	437, 438, 476
458.....	134	509.....	456
459.....	134, 182	511.....	764
460.....	135	512.....	455
461.....	137	513.....	336
462.....	137	514.....	457, 459
463.....	137	515.....	437, 460
464.....	137	516.....	457
465.....	137	517.....	459
466.....	137	518.....	319
467.....	51, 138	519.....	346
469.....	182	520.....	333
470.....	183, 185, 186	521.....	334, 425, 456, 477
471.....	182, 184, 185	522.....	335, 349
472.....	18, 183, 185	523.....	335, 337
473.....	184, 186	524.....	326, 337
474.....	187	525.....	337, 339, 340, 341
475.....	187	526.....	337, 342
477.....	183	527.....	337
478.....	391	528.....	345
479.....	422	529.....	337, 338
480.....	423	530.....	326
481.....	320, 324, 391, 392, 396, 398, 417, 418	531.....	326, 327, 341, 351, 352, 353
482.....	421	532.....	327
483.....	331, 396	533.....	328
484.....	402, 406, 407, 408, 409, 410, 411, 415	534.....	329
487.....	425	535.....	330, 437
488.....	417, 435, 462, 463, 468, 469, 470, 471, 472	536.....	433
490.....	465, 468, 469, 474	537.....	379
		538.....	381
		539.....	368, 370, 371

TABLE OF CASES.

lxxxiii

SEC.	PAGE.	SEC.	PAGE.
540.....	363	590.....	532
541.....	368, 370	591.....	532, 533
542.....	361, 363	592.....	533
543.....	363	593.....	533, 534
544.....	372, 373, 376, 378	594.....	534
545.....	52, 385	595.....	534
546.....	324, 388	596.....	535
548.....	483	597.....	535
549..	482, 483, 484, 487, 488, 489, 490, 492, 493, 498, 513, 517	598.....	536
550..	483, 495, 496, 497, 498, 513	599.....	536
551.....	496, 512, 513	600.....	536, 537
552.....	498	601.....	537
553.....	487, 496, 499	602.....	539
554.....	499	603.....	422, 544, 581, 586
555.....	500	604.....	546, 581
556.....	512, 513	605.....	583, 584
557.....	505	606.....	581, 582
558.....	512, 517	607.....	545, 585, 586
559.....	509	608.....	581
560.....	511	609.....	78, 583, 584
561.....	514, 524	610.....	578, 588, 589
562.....	525	611.....	593, 594, 595
563.....	524	612.....	594, 596
564.....	500, 519	613.....	594, 596
565.....	38, 503	614.....	596, 597
566.....	236, 517	615.....	597
567.....	508, 515, 516, 517	616.....	595
568.....	516, 518, 519, 520	617.....	604
572.....	522, 523, 524	618.....	596
573.....	526	619.....	596
574.....	523	620.....	563, 596, 597
575.....	527	621.....	598
576.....	515, 527	623.....	601, 603
577.....	527	624.....	605
578.....	523	625.....	605
579.....	523	626.....	606
580.....	523	627.....	607
581.....	529	628.....	608
582.....	529, 530	629.....	598, 599
583.....	529, 530	630.....	603
584.....	530, 531	635.....	613, 616, 617
585.....	530	636.....	613, 618, 619, 621, 623, 624, 630, 631
586.....	530	637.....	623, 624, 625, 640
587.....	531	638.....	626, 629
588.....	532	639.....	640
589.....	528, 534	640.....	641

SEC.	PAGE.	SEC.	PAGE.
641.....	642	690.....	685, 686
642.....	642	691.....	686
644.....	644, 647, 650	692.....	686
645.....	646	693.....	687
646.....	647	694.....	687, 688
647.....	647, 649	695.....	687
648.....	649	696.....	684, 687
649.....	239, 240, 650, 651, 652, 655, 656	697.....	656, 688, 689
650.....	657	698.....	688
651.....	657, 658	701.....	689
652.....	660	702.....	689
653.....	660	703.....	690
654.....	645, 660	704.....	690
655.....	655, 661, 662, 824	705.....	691
656.....	667, 668	706.....	691
657.....	668	707.....	694
658.....	668, 669	708.....	692, 693
659.....	669, 670	709.....	694
660.....	670	710.....	695, 696
661.....	670	711.....	244, 696
662.....	670, 688	712.....	645, 696
663.....	670, 671	713.....	701, 703, 704, 710, 711, 712
664.....	671	714.....	711
665.....	671	715.....	713, 714
666.....	671	716.....	714, 715, 716, 739
667.....	671	717.....	751
668.....	671, 672	718.....	751
669.....	672	719.....	752
670.....	672	720.....	587, 753
671.....	672	721.....	805, 806
672.....	672	722.....	806
673.....	672, 673	723.....	140, 193, 364, 369, 776
674.....	666	724.....	796, 802
675.....	666	725.....	792
676.....	667	727.....	794
677.....	662, 663, 665	728.....	252, 787
678.....	663	729.....	303, 798
679.....	663	730.....	304, 510, 789
680.....	663	731.....	754, 756
681.....	645, 661	732.....	756, 757
682.....	673, 675, 800	733.....	759
683.....	676, 677, 678, 679	734.....	759
686.....	680	736.....	767
687.....	683, 685	737.....	767, 768
688.....	675, 684, 685	738.....	768, 770, 772, 773
689.....	683, 684, 685	739.....	772, 773
		740.....	767, 768, 771

TABLE OF CASES.

lxxxv

SEC.	PAGE.	SEC.	PAGE.
743.....	751	805.....	842, 845, 846
744.....	762	806.....	846, 847
745.....	757, 762	807.....	846, 848, 849
746.....	762	808.....	849, 850
747.....	762	809.....	849
751.....	763	810.....	302
755.....	376, 807, 809, 813, 821	811.....	297, 298, 670
756.....	376, 822, 823	812.....	298, 301, 509
757.....	376, 809, 814, 816, 821, 827	813.....	302, 303
758.....	376, 809, 811, 819, 821	814.....	304, 510
759.....	376, 809, 821	815.....	303
760.....	376, 828, 829	816.....	291, 303
761.....	829	817.....	70, 304
762.....	825	818.....	304
763.....	830	819.....	307
764.....	830	820.....	70, 308, 313, 376
765.....	831	821.....	314
766.....	720, 824	822.....	314, 315
767.....	245, 274	824.....	290, 291
768.....	245, 246, 249, 583, 584	825.....	290, 291
769.....	247, 249, 250, 520	826.....	317
770.....	78, 249, 513, 520	827.....	301, 702
771.....	250	835.....	52
772.....	78, 280, 520	836.....	52
773.....	78, 520	842.....	258
775.....	267, 295	844.....	220, 259
776.....	272, 273	860.....	502
777.....	273	864.....	502
778.....	273	870.....	147
779.....	281, 282	872.....	835
780.....	78, 185, 264, 265, 266, 292	873.....	835, 837
781.....	294, 295	885.....	260, 261, 633, 639
782.....	295	886.....	262
783.....	296	904.....	18
784.....	297	905.....	18
785.....	297	906.....	18
786.....	317	907.....	18
787.....	294	927.....	289
796.....	250, 251, 286	923.....	336
797.....	286, 287	961.....	18
798.....	185, 265, 292, 294, 333	985.....	393
799.....	285, 584	989.....	394
800.....	286	1015.....	270
801.....	287	1018.....	368
802.....	285	1205.....	165
803.....	832	1207.....	418
804.....	833	1213.....	17

SEC.	PAGE.	SEC.	PAGE.
1217.....	220	1543.....	74
1236.....	17	1557.....	241
1237.....	18	1588.....	826
1239.....	18	1590.....	76
1260.....	40	1594.....	155
1263.....	717	1596.....	84, 110
1281.....	544	1597.....	174, 175
1282.....	246, 247, 802	1598.....	175
1304.....	278	1599.....	175
1347.....	313, 702	1600.....	96
1351.....	279	1606.....	401
1353.....	275, 276	1619.....	241
1355.....	17	1627.....	177
1362.....	27	1628.....	123, 125
1363.....	23	1629.....	401
1370.....	664, 691	1631.....	237, 240
1387.....	22	1632.....	241
1406.....	656, 689	1638.....	178
1407.....	656	1639.....	400
1496.....	408	1646.....	241
1498.....	167	1651.....	180
1499.....	100, 101, 167	1652.....	179
1500.....	162, 167	1653.....	179
1501.....	167	1654.....	179
1502.....	168, 169	1656.....	180
1503.....	169	1661.....	180
1511.....	401	1670.....	237, 239, 240, 241, 628, 629
1512.....	39	1671.....	241
1513.....	39	1672.....	240, 241
1514.....	40	1673.....	240, 241
1521.....	812, 825	1674.....	243, 244
1522.....	812, 825	1681.....	578, 598
1523.....	812, 825	1686.....	166
1524.....	239, 241	1689.....	410
1526.....	239, 241	1693.....	190
1531.....	96	1720.....	401
1532.....	170	1721.....	401
1533.....	170	1722.....	410
1534.....	134, 170	1736.....	812
1535.....	185	1752.....	97
1536.....	187	1757.....	338
1537.....	172	1758.....	97
1538.....	172	1764.....	401
1539.....	173	1770.....	453
1540.....	174	1772.....	712, 716, 720
1541.....	174, 226	1774.....	226
1542.....	401	1775.....	400, 464

TABLE OF CASES.

lxxxvii

SEC.	PAGE.	SEC.	PAGE.
1776.....	336, 432	1823.....	146
1780.....	59, 231	1925.....	157
1781.....	67, 152, 153	1926.....	156, 157
1782.....	152, 153	1927.....	156
1785.....	67, 129, 153	1928.....	156, 157
1786.....	130, 153	1929.....	156
1787.....	551, 582	1932.....	770
1788.....	729, 736, 738	1937.....	123, 336
1789.....	739	1938.....	336
1790.....	148, 376	1945.....	394
1791.....	148	1948.....	153
1796.....	149	1955.....	545
1797.....	153	1962.....	67, 153
1798.....	67, 128, 153	1969.....	154, 810
1799.....	128	1972.....	102
1801.....	729	1977.....	154
1802.....	551	1982.....	154
1806.....	551, 582	1990.....	598
1809.....	550, 582	1991.....	67
1810.....	727, 728, 729, 735	1994.....	154
1812.....	728	2017.....	67
1814.....	150	2030.....	23
1815.....	414	2067.....	67
1817.....	150	2091.....	67
1818.....	150	2103.....	67
1822.....	103	2104.....	67
1845.....	401	2120.....	67
1851.....	401	2150.....	76
1869.....	709, 714, 715, 716, 719	2153.....	719
1876.....	545	2188.....	76
1877.....	706	2201.....	76
1880.....	125	2219.....	76
1881.....	125	2265.....	563
1882.....	126	2270.....	24
1886.....	126	2284.....	592
1887.....	126	2290.....	154
1888.....	127	2320.....	67
1890.....	127	2339.....	132
1892.....	127	2340.....	132, 166, 171
1897.....	195	2345.....	67
1902.....	99, 151, 808, 810	2348.....	67
1903.....	808	2410.....	76
1904.....	808	2419.....	67, 730
1909.....	144	2423.....	551, 552, 729, 730
1913.....	122	2429.....	729, 730, 731, 736
1914.....	832	2507.....	16
1919.....	146, 147, 625, 781	2653a.....	705

TABLE OF CASES.

SEC.	PAGE.	SEC.	PAGE.
2668.....	150	3302.....	18
2672.....	150	3303.....	18
2718.....	107	3304.....	18
2863.....	759	3305.....	18
2953.....	74	3306.....	18
3017.....	91, 93, 123	3307.....	26
3045.....	77	3310.....	29
3107.....	100	3320.....	724, 725, 749
3158.....	23	3333.....	80
3160.....	219, 595	3334.....	80
3229.....	759	3335.....	80
3236.....	281, 603	3336.....	80
3246.....	723	3337.....	80
3247.....	615	3338.....	139
3251.....	603	3339.....	80, 392
3262.....	18	3343.....	258, 485,
3265.....	18		486, 494, 505, 539, 586, 616,
3280.....	19, 26		617, 619, 631, 640, 694, 695
3281.....	19	3347.....	538
3282.....	26	3399.....	705
3300.....	18	3400.....	705
3301.....	18		

PENAL CODE.

SEC.	PAGE.	SEC.	PAGE.
42.....	21, 27	268.....	5, 203

COURT OF APPEALS RULES.

	PAGE.
Rule 3.....	44

GENERAL RULES.

RULE.	PAGE.	RULE.	PAGE.
2.....	17, 291	15.....	842, 843, 844
3.....	17, 275, 277	16.....	845, 846
4.....	17, 291, 303, 587, 597	18.....	198, 212, 213
5.....	37, 298, 299, 301, 302	19.....	250, 284, 331, 333
6.....	24	21.....	251, 263, 264, 266
7.....	17	22.....	247, 387
8.....	20	23.....	257, 258
10.....	43	24.....	256, 294, 295, 423
11.....	284	25.....	256, 273, 503
13.....	514, 578, 588	27.....	277
14.....	834, 837, 838, 840	30.....	602

RULE.	PAGE.	RULE.	PAGE.
31.....	247	51.....	187
32.....	295	77.....	130, 718
36.....	314, 315	78.....	131
37.....	78, 185, 264, 265, 268, 270	79.....	725
38.....	246, 248, 582	80.....	725, 734, 743
47.....	269	81.....	718
48.....	247, 268	83.....	2
49.....	182, 183, 185	85.....	247
50.....	183, 188		

SESSION LAWS.

	PAGE.		PAGE.
1847 ch. 240.....	6	1890 ch. 568.....	76
1868 ch. 720.....	19	1892 ch. 418, Sec. 1, Sub. 2..	734
1871 ch. 374.....	19	1895 ch. 282.....	734
1877 ch. 11.....	513	1895 ch. 384.....	76
1877 ch. 466.....	716	1896 ch. 139.....	743, 744
1878 ch. 354.....	6	1896 ch. 282.....	735, 748
1880 ch. 245.....	19, 731	1896 ch. 322.....	740, 745
1880 ch. 269.....	67	1896 ch. 665.....	104
1883 ch. 36.....	69	1897 ch. 378.....	192
1883 ch. 378.....	733, 734, 735, 744, 747, 748, 749	1897 ch. 415.....	721
1884 ch. 285.....	739, 740, 741	1897 ch. 417.....	729
1884 ch. 366.....	18	1897 ch. 418.....	705
1885 ch. 342, Sec. 4.....	19	1897 ch. 419.....	705
1885 ch. 380.....	67	1898 ch. 165.....	29
1886 ch. 235.....	19	1898 ch. 334.....	26
1886 ch. 275.....	749	1898 ch. 522.....	741
1886 ch. 310.....		1899 ch. 61.....	46, 50
	733, 736, 737, 740, 741, 750	1899 ch. 225.....	29
1886 ch. 672.....	502, 523, 524	1901 ch. 506.....	749
		1902 ch. 60.....	731

N. Y. REVISED STATUTES, 9TH EDITION.

	PAGE.		PAGE.
2 R. S. pp. 1014-5 § 31.....	99	2 R. S. pp. 1910, 1914. 731, 741, 742	
2 R. S. p. 1026 § 55.....	99	2 R. S. p. 1912.....	742, 743, 750
2 R. S. pp. 1274-5 § 39.....	101	2 R. S. p. 1913.....	742, 743, 747
2 R. S. p. 1438 § 11.....	100	2 R. S. p. 1925.....	75
2 R. S. p. 1802.....	66	3 R. S. pp. 2196, et seq.....	67
2 R. S. p. 1855 § 3.....	100	3 R. S. pp. 2126, 2127.....	743
2 R. S. p. 1882.....	151	3 R. S. p. 2407.....	75
2 R. S. pp. 1907-8.....	731, 741	3 R. S. p. 2409 § 4.....	75
2 R. S. p. 1910.....	730, 737, 741	3 R. S. pp. 2429-2439.....	75

	PAGE.		PAGE.
3 R. S. p. 2435.....	75	3 R. S. p. 2686.....	101
3 R. S. p. 2465.....	127	3 R. S. p. 2871 § 7.....	99
3 R. S. p. 2483.....	75		

N. Y. CONSTITUTION.

	PAGE.		PAGE.
Art. VI. § 1.....	64, 65	Art. VI. § 14.....	4, 68, 71
Art. VI. § 2.....	64, 65	Art. VI. § 19.....	16
Art. VI. § 3.....	15	Art. VI. § 20.....	15
Art. VI. § 5.....	3, 122	Art. VI. § 24.....	64
Art. VI. § 6.....	4, 68	Art. VII. § 6.....	103
Art. VI. § 7.....	16, 60	Art. X. § 1.....	21
Art. VI. § 9.....	61	Art. VIII. § 1.....	21, 27
Art. VI. § 12.....	16, 68		

U. S. CONSTITUTION.

	PAGE.
Art. I. § 6.....	501

U. S. REVISED STATUTES.

SEC.	PAGE.	SEC.	PAGE.
446.....	611	1610.....	502
687.....	57	4063.....	502
863.....	503	4065.....	502
1237.....	502	5242.....	619

GREATER N. Y. CHARTER.

SEC.	PAGE.	SEC.	PAGE.
341.....	503	1288.....	180
1260.....	582, 584, 598	1570.....	27

GENERAL LAWS.

BANKING LAW.

SEC.	PAGE.	SEC.	PAGE.
17	730	115	312
18	730	156, Sub. 6	698, 714
33	67, 732	158	693
36	67		

CANAL LAW.

SEC.	PAGE.
31	501

COUNTY LAW.

SEC.	PAGE.	SEC.	PAGE.
3	156	184	22, 24
16	75	187	27
165	20	188	27
180	21, 27	189	29
181	21, 26	190	27
182	21	234	156
183	22		

GENERAL CORPORATION LAW.

SEC.	PAGE.	SEC.	PAGE.
15	634	27	67

MANUFACTURING CORPORATION LAW.

SEC.	PAGE.
12	114

MEMBERSHIP CORPORATION LAW.

SEC.	PAGE.
13	67

RELIGIOUS CORPORATION LAW.

SEC.	PAGE.	SEC.	PAGE.
5	552	110	552
11	67		

STOCK CORPORATION LAW.

SEC.	PAGE.
24.....	307

ELECTION LAW.

SEC.	PAGE.
133.....	67

HIGHWAY LAW.

SEC.	PAGE.
83.....	76

INSURANCE LAW.

SEC.	PAGE.	SEC.	PAGE.
23.....	745	77.....	745
30.....	209	207.....	733
76.....	733, 745	208.....	733

LABOR LAW.

SEC.	PAGE.	SEC.	PAGE.
8.....	721	8.....	742

LEGISLATIVE LAW.

SEC.	PAGE.
2.....	501

LIEN LAW.

SEC.	PAGE.
8.....	705, 721

MILITARY CODE.

SEC.	PAGE.
148.....	501

PERSONAL PROPERTY LAW.

SEC.	PAGE.	SEC.	PAGE.
7.....	317	25.....	720

PUBLIC OFFICERS' LAW.

SEC.	PAGE.	SEC.	PAGE.
2.....	27	13.....	21, 27
3.....	22, 27	15.....	21, 27
5.....	21, 27	20.....	21, 27
10.....	21, 27	41.....	6

REAL PROPERTY LAW.

SEC.	PAGE.
260.....	259

STATUTORY CONSTRUCTION LAW.

SEC.	PAGE.	SEC.	PAGE.
25.....	111, 292	27.....	292, 293
26.....	292	28.....	293

TOWN LAW.

SEC.	PAGE.
182.....	157

PRACTICE,

UNDER

THE CODE OF CIVIL PROCEDURE.

CHAPTER I.

THE COURTS OF THE STATE OF NEW YORK.

ARTICLE I.—The courts, their judges and officers.

ARTICLE II.—The jurisdiction of the courts.

ARTICLE I.

THE COURTS, THEIR JUDGES AND OFFICERS.

SECTION.

1. The rules and how made.
2. The courts of record.
3. When and how open.
4. The terms of the courts and their appointment.
5. The judges.
6. Clerks of the courts.
7. Sheriffs.
8. Coroners.
9. Elisors.
10. Attorneys and counsellors.

Sec. 1. The Rules, and How Made.

The practice treated of in this book will be that exclusively of the courts of record of this state. No principles of law will be discussed or stated, except as they bear upon the practice of those courts. These principles are chiefly to be found in the Code of Civil Procedure and in the general rules of practice which are adopted from time to time by a convention

of judges. The members of this convention are the justices assigned to the appellate division of the Supreme Court, who are required to meet in convention at the Capitol, in the city of Albany, on the fourth Tuesday of October, 1895, and at least every second year thereafter, for the purpose of establishing rules of practice. (Co. Civ. Proc., § 17). The rules thus established are called the "General Rules of Practice." They are binding upon all the courts in this state, and the judges and justices thereof; except the court for the trial of impeachments and the court of appeals. These rules must be consistent with the provisions of the Code, and the convention has no power to alter, modify or annul any rule established by the Code, but only to make such rules as may be necessary, and are in harmony with its provisions. (*Gormerly v. McGlynn*, 84 N. Y., 284). If one of the rules is inconsistent with the statute it is void. (*Rice v. Ehele*, 55 N. Y., 518; *French v. Powers*, 80 N. Y., 146). The rules have the force and effect of statutes. They are binding upon the courts, as well as the citizens, and the courts have no more right to disregard them than they would have to disregard the statute. (*Matter of Moore*, 108 N. Y., 280; *Ives v. Ives*, 80 Hun, 136).

The general rules of practice thus made do not take effect until they have been published, once in each week, for three successive weeks, in the newspaper published at Albany in which legal notices are required by law to be published. (Co. Civ. Proc., § 18). Subject to the Code, and the general rules of practice, the different courts of record and the appellate division in each department are authorized to make such other and further rules in regard to the transaction of business before them, as may be necessary. (General Rule 83). It is not designed in this work to collect the rules thus made.

In cases where no provision is made by statute, or by the general rules of practice, the proceedings of the courts must be according to the practice which formerly existed in the court of chancery or supreme court. (General Rule 84). In the court of appeals, where the statutes are silent, the former practice in the court of errors will be followed. (*Hastings v. McKinly*, 8 How. Pr., 175; *Mu. L. I. Co. v. Bigler*, 79 N. Y., 568, 571).

Sec. 2. The Courts of Record.

The Courts of Record in the State, are:—

1. The court for the trial of impeachments.
2. The court of appeals.
3. The appellate division of the supreme court, in each department.
4. The supreme court.
5. The court of general sessions of the peace in and for the city and county of New York.
6. The city court of Long Island City.
7. The city court of Yonkers.
8. A county court in each county, except New York.
9. The city court of the city of New York.
10. The mayor's court of the city of Hudson.
11. The recorder's court of the city of Utica.
12. The recorder's court of the city of Oswego.
13. The justices' court of the city of Albany.
14. A surrogate's court in each county.
15. The court of claims.

(Co. of Civ. Proc. § 2.)

Down to the first day of January 1896, there were also in existence, in the state, courts of general jurisdiction in the cities of New York, Brooklyn and Buffalo, which were called the superior city courts. They consisted of the Superior Court of the City of New York; the Court of Common Pleas for the City and County of New York, the City Court of Brooklyn, and the Superior Court of Buffalo. These courts were abolished by Article 6, § 5, of the Constitution, which went into effect on the first day of January 1895, but the abolition of the courts was not to take effect until the first of January 1896. The jurisdiction exercised by these courts is now vested in the Supreme Court. (Constitution, Article 6, § 5.). After the first of January, 1896, the judges of these courts became justices of the Supreme Court, with power to sit only in the counties in which they were elected. As their terms of office expire, however, their successors are to be elected as justices of the Supreme Court, having the same power and authority as other justices of that court. (Constitution, Article 6, § 5). At the same time, the circuit courts and the courts of Oyer and Terminer, which had existed from the earliest history of the province of New York, and had been continued as courts of the State, were also

abolished, and all their jurisdiction and authority were vested in the Supreme Court, to be exercised at a trial term of that court. (Const., Art. 6, § 6).

At the same revision of the Constitution, the courts of sessions, theretofore existing, were abolished in every county of the State, except the county of New York, and their jurisdiction was vested in the county court. (Const., Art. 6, § 14).

The Board of Claims was continued and its name changed to the Court of Claims by Chapter 36 of the laws of 1897. It was also made a court of record. (Co. Civ. Proc. §§ 263-281).

The courts mentioned in section three of the Code of Civil Procedure are not courts of record, and the practice in those courts will not be treated of in this work.

Sec. 3. When and How Open.

The sittings of every court in the State shall be public, and every citizen may freely attend the same, except that in all proceedings and trials, in cases for divorce on account of adultery, seduction, abortion, rape, assault with intent to commit rape, criminal conversation and bastardy, the court, may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses and officers of the court. (Co. Civ. Proc. § 5). If the court order the court room to be cleared during the progress of a trial, it is not error and a new trial will not be granted therefor, in the absence of proof that the party complaining was injured by such action. (*Marshall v. Rochester Printing Company*, 35 Hun, 667). No court shall be open or transact any business on Sunday, except to receive a verdict or discharge a jury. An adjournment of court on Saturday, unless made after a cause has been submitted to a jury, must be to some other day than Sunday, but this section does not prevent the granting of an injunction order by a justice of the supreme court when in his judgment it is necessary to prevent irremediable injury, or the service of a summons with or without a complaint if accompanied by an injunction order and an order of such justice permitting service on that day. (Co. Civ. Proc. § 6). Process in a civil case can neither issue, nor be returned, nor be served

on Sunday, and service of any process on that day, except as allowed by statute, is absolutely void for any and every purpose. (*Scott Shoe Machinery Co. v. Dancel*, 63 App. Div. 172; *Van Vechten v. Paddock*, 12 Johns. 178; Penal Code, § 268). But if a process is made returnable on Sunday, and the defendant against whom it is addressed gives bail, or makes a general appearance in the action, the defect is waived (*Wright v. Jeffrey*, 5 Cowen, 15). No court can enter any judgment on Sunday (*Hoghtaling v. Osborn*, 15 Johns. 119), and if a judgment is entered on Sunday it is void and it does not prevent a valid entry of judgment on a subsequent day. (*Allen v. Godfrey*, 44 N. Y. 433). A writ of inquiry to assess damages cannot be issued on Sunday, nor can a jury, summoned to execute such a writ, although they were empanelled and heard the case on Saturday, assess the damages and deliver their verdict on Sunday. (*Butler v. Kelsey*, 15 Johns. 177). A notice of motion cannot be served on Sunday. (*Field v. Park*, 20 Johns. 140). Process made returnable on Sunday is irregular. (*Gould v. Spencer*, 5 Paige, 541). It is not void, but may be amended by the court. (*Boyd v. Vanderkemp*, 1 Barb. Ch. 273). The General Term of the Supreme Court for the First District has intimated, however, that an order for the examination of a debtor in supplementary proceedings, returnable on Sunday, is a nullity. (*Arctic F. I. Co. v. Hicks*, 7. Abb. Pr. 204). An award cannot be made and published on Sunday (*Story v. Elliott*, 8 Cow. 27); although subsequent acts founded on such an award may be binding (*Ibid.*); and where the parties, witnesses, and arbitrators were all Jews, and the trial was had on Sunday, and the award made and signed on that day, but dated on Monday, and not delivered until Monday, it was held valid, because the meeting of the Jews on Sunday was not unlawful, and the award was deemed to have been published on Monday. (*Isaac v. Beth Hamedrash Soc.* 1 Hilt. 469). Sunday extends from midnight to midnight. (*Pulling v. People*. 8 Barb. 384). A writ of habeas corpus may be issued and served on Sunday, but it cannot be made returnable on that day. (Co. Civ. Proc. § 2015). The court may be held open to receive a verdict on Sunday, where the case was submitted to the jury before that day (Co. Civ. Proc. § 6); and a cause may be continued from

Saturday until Monday. (*Vanderwerter v. The People*, 5 Wend. 530). No instructions can be given on Sunday to the jury, in a cause which has been previously submitted to them (*Roberts v. Bower*, 5 Hun 558); although if this is done, the irregularity is waived if the parties do not object. (*Ibid.*). Formerly it was provided by statute, that no court should be open or transact any business in any city, or town, on the day of general election, or town meeting (laws of 1878, chap. 354), was held therein, unless it were for the purpose of receiving a verdict, or discharging a jury; and every adjournment of the court in any such city or town, on the day next preceding the day on which any such election was to be held therein, should always be to some day other than the day of such election, except such adjournment as might be made after a cause had been submitted to a jury (laws of 1847, chap. 240). This, however, seems to have been repealed by the Election Law, section 198, and not to have been re-enacted. By section 24 of the Statutory Construction law, certain days therein mentioned were declared to be holidays. Among them was the period of noon to midnight of each Saturday, which was declared to be a half-holiday. It is provided that holidays and half-holidays shall be considered as Sunday, for all purposes relating to the transaction of business in the public offices of the State, and of each county. (Pub. Off. Law, Sec. 41). But this statute does not invalidate the service of process made on any holiday, except Sunday. (*Didsbury v. Van Tassell*, 56 Hun 423; *Matter of Bornemann*, 6 App. Div. 524). It has been held also that the courts were not public offices, within the terms of the act, prescribing that holidays and half holidays shall be considered as Sunday, and that those acts did not prohibit the holding of courts on holidays, or on the afternoon of Saturdays. (*People v. Kearney*, 47 Hun, 129; *Berthold v. Wallach*, 14 Misc., 55; *Carey v. Reilly*, 20 Misc., 610).

Sec. 4. The Terms of the Courts and their Appointment.

THE COURT OF APPEALS.

The terms of the court of appeals must be appointed to be held at such times and places as the court thinks proper, and

they must continue so long as the public interest requires. (Co. Civ. Proc. § 196). They may be appointed to be held in a building, other than that designated by law for holding courts. (Co. Civ. Proc. § 197). They are usually held at Albany, but sometimes they have been held in the city of New York, or at Saratoga.

THE SUPREME COURT.

Terms of the appellate divisions of the supreme court are to be appointed by the appellate division in each department. (Co. Civ. Proc. § 225). They are to be held in the first department, in the city of New York; in the second department, in the city of Brooklyn; in the third department, in the city of Albany; and in the fourth department in the city of Rochester; but terms of the court may be held elsewhere in the respective departments, whenever, in the discretion of the justices thereof respectively, the public interest may require. (Co. Civ. Proc. § 220). The places of such terms are to be appointed by the appellate division in each department, and each term shall continue so long as the appellate division deems proper. (Co. Civ. Proc. § 225). The appointments of these terms must be made and filed in the office of the Secretary of State, at least thirty days before the commencement of the terms. (Co. Civ. Proc. § 226). The justices of the appellate division, in each department, are authorized to fix the times and places for holding special and trial terms for the supreme court therein, and to assign the justices of the departments to hold such terms, or make rules therefor; and may from time to time make additional appointments and designations, or change or alter those already made. If the justices of the appellate divisions shall not have fixed the times and places for holding these courts, or made rules therefor, before the first day of December, 1895, and every second year thereafter, the justices of the supreme court for each judicial district, or a majority of them, not designated as justices of the appellate division, must, between the first and fifteenth days of December of each of said years, appoint the times and places for holding the trial and special terms of the supreme court within their

judicial district, for two years from the first day of January of the year next following. If, for any reason, such an appointment is not made before the expiration of the time so specified, it must be made at the earliest convenient time thereafter. At least one special term and two trial terms must be appointed to be held in each year, in each county separately organized. Fulton and Hamilton counties are, however, deemed one county, for the purposes of this section. Two or more trial terms may be appointed to be held, and may be held, at the same time in any county. A trial term in any county may be held in two or more parts, and a jury panel may be summoned to serve in each part or jurors may be drawn from one panel. (Co. Civ. Proc. § 232). This section of the code is not simply directory, but the courts must be held at the times and places so appointed, and if courts have been appointed to be held at a particular time and place, the judge assigned to hold it has no authority to adjourn the court to be held at another place within the district (*Northrup v. The People*, 37 N. Y. 203), except as provided by sections 37 and 239 of the Code of Civil Procedure. Although the justices of the appellate division do not make such designations until after the first day of December, the designations are valid. (*People v. Youngs*, 151 N. Y. 210). A term, held by a justice of another department, duly assigned by the justices of an appellate division to hold such term in their department, is valid, provided such justice is not a member of an appellate division. (*People v. Hermann*, 149 N. Y. 190; *People v. Pustolha*, 149 N. Y. 570). The governor may, when, in his opinion the public interest so requires, appoint one or more extraordinary terms of the appellate division of the supreme court in any department, or of the special or trial terms of the supreme court. He must designate the time and place of holding the same, and name the justice who shall hold, or preside at such term, except of the appellate division; and he must give notice of the appointment in such manner as, in his judgment, the public interest requires. (Co. Civ. Proc. § 234). The provisions of this section do not conflict with § 2, Art. 6 of the Constitution, giving the justices of the appellate division power to fix the times and places for holding special and trial terms. (*People v. Young*, 18 App. Div. 162). If it

appear to the satisfaction of the presiding justice of the appellate division in any department that a special or trial term of the supreme court, duly appointed therein, is in danger of failing, he may designate a justice who resides in that department to hold such term in the absence of the justice assigned thereto. If in the opinion of such presiding justice it is not practicable to make a designation from his department, he shall so inform the governor who may thereupon designate for such term a justice from any department. (Co. Civ. Proc. § 237). The place appointed within each county for holding a special term of the supreme court, at which issues of fact are triable, or a trial term must be that designated by the statute for holding the county court (Co. Civ. Proc. § 238); but the parties to an action pending in any court of record may with the consent of the judge who is to try or hear it, without a jury, stipulate in writing, that it may be heard, or tried and determined, elsewhere than at the court house; the stipulation must specify the place of trial or hearing, and must be filed in the office of the clerk, and the trial or hearing must be brought on, on the usual notice, unless otherwise specified in the stipulation. (Co. Civ. Proc. § 37). A special term of the supreme court may be adjourned to a future day, and to the chambers of any justice of the court, residing within the judicial district, by an entry in the minutes, and may then be adjourned from time to time as the justice holding the same directs. An action triable by the court, without a jury, which was upon the calendar of the term before it was adjourned, may be tried at a term so adjourned to be held at chambers, by consent of both parties, but not otherwise. (Co. Civ. Proc. § 239). This, however, does not authorize the transfer of the trial of a local action to another county, but it is intended simply to facilitate the transaction of such business as may be done in the county to which the term is adjourned, and where a local action, triable in one county, is upon the calendar of the special term, which was adjourned to the chambers of the judge in another county, it is error to try that action at the adjourned term. (*Gould v. Bennett*, 59 N. Y. 124). Ex parte matters may be heard at such adjourned terms, but contested motions cannot be heard there, unless by consent of both parties. (*Matter of Wadley*, 29 Hun, 12).

THE CITY COURT OF THE CITY OF NEW YORK.

The city court of the city of New York is always open for the transaction of any business, for which notice is not required to be given to the adverse party. The justices of the court must appoint, and may alter the times for holding general, special and trial terms of the court; they must prescribe the duration of the terms, designate the trial terms at which jurors are required to attend, and assign the justice or justices to preside and attend at each of the terms so appointed. Each trial and special term must be held by one justice, and each general term by at least two justices. Two or more general, special, or trial terms may be appointed to be held at the same time. (Co. Civ. Proc., § 324)

THE COUNTY COURTS.

The county court is always open for the transaction of any business, for which notice is not required to be given to the adverse party, except where it is specially prescribed by law, that the business must be done at a stated term. The county judge must, from time to time, appoint the times and places for holding terms of his courts. At least two terms for the trial of issues of law or of fact must be appointed to be held in each year. Each term may continue as long as the county judge deems necessary. The county judge may, by a new appointment, change the day appointed for holding a term, or appoint one or more additional terms, or dispense with the holding of a term, without affecting any other term or terms theretofore appointed to be held. Each term must be held at the place designated by statute for that purpose, except that the county judge may, from time to time, adjourn a term to any place within the county, for the hearing and decision of motions and appeals and trials, and any other proceedings without a jury; and may appoint as many terms as he thinks proper to be held, either at the court house, or elsewhere in the county, for the same purpose. (Co. Civ. Proc. § 355),

THE COURT OF CLAIMS.

The court of claims shall hold at least four sessions in each year at the capitol in the city of Albany, and it may also hold adjourned or special sessions at such other times and places in the state as it may determine. It may also hold a session, and take testimony where the claimant resides or where the claim is alleged to have arisen, or in the vicinity, and may view any premises affected by the proceeding. (Co. Civ. Proc. § 268).

ADJOURNMENTS.

Any term of a court of record may be adjourned from day to day, or to a specified future day, by an entry in the minutes. Jurors may be drawn for and notified to attend a term so adjourned, and causes may be noticed for trial thereat, as if it was held by original appointment. Any judge of the court may so adjourn a term thereof, in the absence of a sufficient number of judges to hold the term. (Co. Civ. Proc. § 34). This provision of the Code does not limit the power of the courts in regard to adjournments, but a court has inherent power to adjourn its proceedings from day to day, so long as it is necessary to finish the business brought before it, unless, by the existence of some statute, its existence is sooner brought to a close. (*People v. Sullivan*, 115 N. Y. 185). If the court has adjourned to a day certain, and by some unforeseen event, the meeting of the court on that day is rendered impossible, but the sitting begins as soon as possible after the obstruction is removed, the court has not lost jurisdiction and its sitting is valid. (*People v. Sullivan, supra*). If a judge, authorized to hold a term of a court of record, does not come to the place where the term is appointed to be held, before four o'clock in the afternoon of the day so appointed, the sheriff or clerk must then open the term, and forthwith adjourn it to nine o'clock in the morning of the next day. If the judge attend before four o'clock in the afternoon of the second day, he must open the term; otherwise, the sheriff or the clerk must adjourn it without day. (Co. Civ. Proc. § 35). If before four o'clock of the second day, the sheriff or the clerk receives from a judge authorized to hold the term, a written direction to adjourn the term to a future day certain, he must adjourn it

accordingly, instead of adjourning it as prescribed in the last section, and the direction must be entered in the minutes as an order. (Co. Civ. Proc. § 36).

Section 5. Judges.

A judge shall not sit as such in, or take any part in the decision of, a cause or matter to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree. The degree shall be ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the judge and party, and excluding the common ancestor. But a judge of the court of appeals shall not be disqualified from taking part in the decision of an action or special proceeding in which an insurance company is a party or is interested, by reason of his being a policyholder therein. (Code Civ. Proc. § 46). The prohibition contained in this section applies only to a judge or justice holding a court *eo nomine*. (*O'Reilly v. City of Kingston*, 114 N. Y. 439). It includes justices of the peace, (*Birdsall v. Fuller*, 11 Hun, 204), but it has no application to commissioners of highways, (*Foot v. Stiles*, 57 N. Y. 399); nor a commissioner to award damages, (*People v. The Mayor*, 63 N. Y. 291); nor to assessors, (*O'Reilly v. Kingston*, *supra*.) Neither does it include commissioners appointed solely for the purpose of looking into the general necessity of a proposed street extension, whose decision is subject to the subsequent scrutiny and oversight of a court. (*Matter of Ogden St.*, 63 Hun, 188). A trial and conviction before a court, composed of the county judge and two justices of the peace, one of whom was related to the defendant within the sixth degree is void. (*People v. Connor*, 142 N. Y. 130). A guardian *ad litem* is not a party within the meaning of the section and a surrogate is not disqualified by the fact that his brother has been appointed such guardian. (*Matter of Van Wagonen*, 69 Hun, 365). A party to an action of partition who has been served with the pleadings of other parties, but has not answered and who is pecuniarily interested respecting the extent of her title, is a party within the section. (*Matthews v. Noble*, 25 Misc. 674; *affd.* as to this point, 39 App. Div. 655).

A surrogate, who before his election had advised the executor and who had acted as attorney for the estate in foreclosure suits thereafter, is disqualified to settle the executor's accounts. (*Wigand v. Dejonge*, 8 Abb. N. C. 260; *Darling v. Pierce*, 18 Hun, 542). A surrogate is competent, however, to entertain an application for the probate of a will, although related by affinity within the sixth degree to one designated as a legatee therein. (*Hopkins v. Lane*, 6 Demarest, 12). Where the interest of the judge is minute, or where it is not so direct that the result must necessarily affect him, to his personal or pecuniary loss or gain, and where he has so exclusive jurisdiction of the cause or matter by law, as that his refusal to act will prevent any proceeding in it, then he may act, so far as that there may not be a failure of remedy. (*Matter of Ryers*, 72 N. Y. 1). Consanguinity or affinity of a judge was not a disqualification at common law, but it rests only on the statute, and cannot be extended beyond the terms of the statute. (*Matter of the Dodge and Stevenson Manufacturing Company*, 77 N. Y. 101). Consanguinity is the relation of persons descended from the same common ancestor; affinity is the relationship which exists between the husband and the blood relatives of the wife, or the wife and blood relatives of the husband. (*Carman v. Newell*, 1 Denio, 25; *Paddock v. Wells*, 2 Barb. Ch. 331). Death of either without issue severs the relationship. (*Ibid.*). A judge who is related to the real party, is disqualified on that account. (*Foot v. Morgan*, 1 Hill, 654). The co-executor of an estate which holds stock in a railway company is disqualified to try an action against the company. (*Cregin v. The Brooklyn Cross Town Rail Road Co.* 8 Abb. Dig. 79). The disqualification exists, although the party to whom the judge is related is merely surety, and is fully indemnified. (*Oakley v. Aspinwall*, 3 N. Y. 547). At common law, although the judge was disqualified, his acts were not void, and the only remedy was by proceedings to set them aside. (*Foot v. Stiles*, 57 N. Y. 399). But since the passage of the statute, any act taken by him in the cause, or order or judgment entered by his direction, is void, (*Chambers v. Clearwater*, 1 Abb. Ct. App. Dec. 341; *Foot v. Morgan*, 1 Hill 654), and the express consent of all parties that he sit and their waiver of his disqualification

cannot make a judgment rendered by him valid. (*Oakley v. Aspinwall*, 3 N. Y. 547; *Murdock v. Internat'l Tile & Trim Co.* 14 Misc. 225). Taking an acknowledgment is not a judicial act within this statute. (*The Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474). A judge is not disqualified in an action in which a corporation is a party, because he is a relative of one of the stockholders of the corporation. (*Matter of the Dodge and Stevenson Co.* 77 N. Y. 101). The disqualification does not extend to a case where the judge is only interested in the questions of law involved (*People v. Edmunds*, 15 Barb. 529); nor where the relation of the judge has no interest in the subject matter, or in the decision, as in the appointment of a relative of the judge to be the committee of a lunatic (*Matter of Hopper*, 5 Paige, 489), or to be the guardian of an infant. (*Underhill v. Dennis*, 9 Paige, 202). In either of these cases, the judge has authority to appoint his own relative, if he desire. The judge, who is a relative to one defendant, not in possession of lands that have been sold on the foreclosure of a mortgage, is not disqualified from granting a writ of assistance against another defendant, who is in possession. (*New York Life Insurance and Trust Co. v. Rand*, 8 How. Pr. 35, 352). Although a judge is disqualified, an order appointing a referee, entered by consent of parties, before him, is not void or irregular, because it might have been entered on their written consent, without his approval. (*Bell v. Vernooy*, 18 Hun, 125). A judge, other than a judge of the court of appeals, or of the appellate division of the supreme court, shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge. (Co. Civ. Proc. § 46). This section does not, however, forbid a judge who has not heard the argument, from sitting with two judges who did hear it, to constitute an appellate court, and a decision made by a court thus constituted, where the judge who did not hear the argument, took no part in deciding it, is valid. (*Corning v. Slosson*, 16 N. Y. 294). But where one of the judges, necessary to constitute a trial court, is absent during part of the trial and then sits, with his associates to receive the verdict, the judgment entered on said verdict will be reversed. (*People v. Shaw*, 63 N. Y. 36). No judge shall, directly or indirectly, be

interested in the costs of an action or special proceeding, brought before him, or in a court of which he is, or is entitled to act as, a member, except an action or special proceeding to which he is a party, or in which he is interested. (Co. Civ. Proc. § 47). A judge of a court of record is not disqualified from hearing or deciding an action, or special proceeding, or any matter, or question, by reason of his being a resident or taxpayer of a town, village, city, or county, interested therein. (Co. Civ. Proc. § 48). No judge shall practice or act as attorney or counsel, in a court of which he is, or is entitled to act as, a member, or in a cause originating in that court. Nor shall a law partner of, or person connected in the law business with a judge, practice or act as an attorney or counsel, in a court of which the judge is, or is entitled to act as, a member, or in a cause originating in that court; except where the latter is a member of a court, *ex-officio*, and does not officiate or take part as, a member of that court, or in any of the proceedings therein. An *ex-officio* judge shall not, directly or indirectly, be interested in the costs, or the compensation of an attorney or counselor, in the court of which he is *ex-officio* a judge. (Co. Civ. Proc. § 49). No judge of the court of appeals, or a justice of the supreme court, or any county judge or surrogate, hereafter elected in a county having a population exceeding one hundred and twenty thousand, shall practice as an attorney or counselor in any court of record in this state, or act as referee. (Const. Art. 6, § 20). By the same section the Legislature has power to impose a similar prohibition upon the county judges and surrogates, in other counties than those mentioned above, but no such action has yet been taken.

No judge or justice shall sit in the appellate division, or in the court of appeals, in review of a decision made by him, or any court of which he was at the time a sitting member. (Const. Art. 6, § 3; *Van Arsdale v. King*, 152 N. Y. 69). A judge has been held to be disqualified, under this section, from sitting on an appeal from a judgment entered on a referee's report, where the form of the judgment was settled by the judge and an extra allowance granted by him. (*Murdock v. International &c. Co.*, 14 Misc. 225). But a judge is not disqualified from taking part in the determination of an

appeal from an order by the mere fact that he signed the order, where the decision was made by another judge and the signing of the order was merely *pro forma*. (*Mori v. Pearsall*, 14 Misc. 251). No person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age. (Const. Art. 6, § 12). This provision of the Constitution applies to county judges, (*People v. Brundage*, 78 N. Y. 403), but not to justices of the peace, (*People v. Mann*, 97 N. Y. 530); nor to surrogates, (*People v. Carr*, 100 N. Y. 236).

Sec. 6. The Clerks of the Courts.

The clerk of the court of appeals is appointed by that court, (Const. Art. 6, § 7), and he is required to keep his office at the seat of government. (Const. Art. 6, § 19). The clerk of the appellate division of the supreme court, in each department, is appointed by that court, and he is required to keep his office at a place to be designated by them. (Const. Art. 6, § 19; Co. Civ. Proc. §§ 89, 221). The surrogate's clerk is appointed by that officer. The constitution provides that the clerks of the several counties are clerks of the supreme court, with such power and duties as shall be prescribed by law. (Const. Art. 6, § 19). They are also clerks of their respective county courts. The clerk of the court of claims is appointed by that court. (Co. Civ. Proc. § 266).

Each court of record has a seal. The seal of the county is the seal of the supreme court in that county, and, except in the city and county of New York, of the county court of that county. (Co. Civ. Proc. § 27). The seal of the surrogate of each county is the seal of the surrogate's court of that county, and is to be used as such by the officer who discharges the duties of surrogate. (Co. Civ. Proc. § 27). The justices of the appellate division of each department are required to adopt and procure an official seal for that department, which is to be used for the seal of that court in the department. (Co. Civ. Proc. § 232). The seal of each court is in charge of the clerk, except that of the surrogate's court, of which the surrogate has charge. (Co. Civ. Proc. § 2507). The clerk of each court, except the surrogate's

court, has charge of the records and papers of the courts. He signs and enters orders and judgments, made by the court, and files all papers which are deposited in his office. (General Rules, 2, 3, 4). He certifies all copies of such judgments, orders or papers. The clerk of the appellate division in each department is directed to keep these books: 1st. A book properly indexed in which shall be entered the title of all actions and proceedings which are pending in that court, and all actions or special proceedings commenced in the appellate division with entries under each, showing the proceedings taken therein and the final disposition thereof. 2d. A minute book, showing the proceedings of the court from day to day. 3d. A *remittitur* book, containing the final order made upon the decision of each case, a certified copy of which shall be transmitted to the proper clerk as required by the Code of Civil Procedure [the clerk of the county where the judgment or order appealed from was entered. (Co. Civ. Proc. § 1355)]. 4th. A book properly indexed, in which shall be recorded at large all bonds or undertakings filed in his office, with a statement of the action or special proceeding in which it was given, and a statement of any disposition made of or order concerning it. The clerk of each court other than the appellate division is, in addition to the judgment book directed to be kept by the Code of Civil Procedure (§ 1236) to keep the following: 1st. A book properly indexed, in which shall be entered the title of all civil actions and special proceedings, with proper entries under each, denoting the papers filed, and the orders made, and the steps taken therein, with the dates of the several proceedings. 2d. A book in which shall be entered at large each bond and undertaking filed in his office, with a statement showing when filed and a statement of any disposition or order made of, or concerning it. 3rd. Such other books properly indexed, as may be necessary to enter the minutes of the court, docket judgments, enter orders, and all other necessary matters and proceedings, and such other books as the appellate division in each department shall direct. (General Rule, 7). It is the duty of the clerk of the court to assess the amount due on the entry of judgments, which may be entered without application to the court, if an assessment is necessary. (Co. Civ. Proc. § 1213).

The clerk must also file judgment rolls, and make a minute on the back of each of the year, month, day, hour and minute of filing the same. (Co. Civ. Proc. §§ 1237, 1239). He must tax all costs awarded to any party, either by statute, or by order of the court, unless the court directs otherwise (Co. Civ. Proc. § 3262); but such taxation may be reviewed by the court. (Co. Civ. Proc. § 3265). The clerk must act as guardian *ad litem* for an infant defendant where the court or judge appoints him. (Co. Civ. Proc. § 472). Commissions executed without the state may be opened by the clerk, and are filed in his office. (Co. Civ. Proc. §§ 904, 905, 906, 907). He must also, on request and offer to pay the proper fees, search the records, etc., in his office and make and certify transcripts therefrom, or certify that a paper, of which the custody legally belongs to him cannot be found. (Co. Civ. Proc. § 961). The court will correct any irregularities or mistakes of the clerk, or any other officer, and will not allow any party to suffer by such mistake. (*Neele v. Berryhill*, 4 How. Pr. 16; *Close v. Gillespie*, 3 Johns. 526). The clerk has power to take affidavits (Co. Civ. Proc. § 842), and such power is purely ministerial, and not judicial, and may be done by one so related to the party as to be disqualified as a judge. (*Lynch v. Livingston*, 6 N. Y. 422). Each clerk is entitled to fees for certain services, which are fixed by statute. The fees of the clerk of the court of appeals are fixed by § 3300 of the Code of Civil Procedure. The fees of the clerks of courts of record for their services, in an action or special proceeding pending in those courts, are fixed by sections 3301 and 3303 of the Code of Civil Procedure, but section 3301 does not apply to the clerk of the surrogate's court, or of the city court of the city of New York, or the city court of Yonkers, or the justices' court of the city of Albany, or of a mayor's, or recorder's court. (Co. Civ. Proc. § 3302). The fees of the county clerk for services out of court are established by section 3304 of the Code of Civil Procedure, and the register of any county, or the clerk of any court of record, is entitled, for the services specified in that section, to the fees specified therein, subject to the qualifications contained in that section. (Co. Civ. Proc. § 3306). By special statutes different fees are given to the county clerk of the county of New York (Co. Civ. Proc. § 3305; Laws of 1884, chap. 366,

§ 4; Laws of 1886, chap. 235; Laws of 1885, chap. 342, § 4; Laws of 1880, chap. 245, § 3, subd. 14), and to the county clerk in Kings county. (Laws of 1868, chap. 720; Laws of 1871, chap. 374). The clerk must perform all services required of him, without fee, except as the law prescribes, and he cannot receive any greater fee or compensation than that allowed by law for any particular services. (Co. Civ. Proc. § 3280). He may demand his fees in advance (Co. Civ. Proc. § 3281), but he cannot insist, before performing some service required of him, that he shall be paid for some previous services, for which he has given credit. (*Purdy v. Peters*, 15 Abb. Pr. 160; 23 How. Pr. 328). The trial fee, allowed by subdivision one of section 3301, is not payable until the cause is moved for trial. (*Malcomb v. Jennings*, 1 Co. Rep. 4). It is intended to pay the clerk for the ordinary miscellaneous services required of him, during the progress of the action, including putting the cause on the calendar, and services rendered in court at the trial. (*People v. Supervisors of Monroe*, 15 How. Pr. 225). It includes the trial of an issue of law, as well as an issue of fact. The clerk is allowed a trial fee if the cause is tried, whether the jury agree or not. He cannot charge a trial fee for a reference to take an account, or to assess damages (*Taaks v. Schmidt*, 25 How. Pr. 340); although where an inquest is taken at the circuit the trial fee is chargeable. Where the cause, being on the circuit calendar, is referred, a trial fee to the clerk is not allowed. (*Benton v. Sheldon*, 1 Co. Rep. 134). The trial fee is allowed, not only on the trial of an action at the circuit, or trial term, or special term, but also upon the argument, at general term, of an appeal from a judgment, or where a judgment is affirmed or reversed by default. But it is not allowed upon the argument of an appeal from an order; nor upon a motion for a new trial at the general term; nor where a cause is put upon the calendar, but not argued. (*Matter of Clerk's fees*, 5 How. Pr. 13). The clerk may charge five cents a folio, for the return to the court of appeals. (*Chambers v. Appleton*, 47 Super. Ct. 524). He cannot be required to adopt a return prepared by parties or counsel, although he may do so if he chooses, but if he does, he can only charge the fee allowed for a certificate. (*Townsend v. Nebenzahl*, 2 McC. Civ. Proc. Rep. 342, note). Each county

clerk, subject to the approval of the justices of the supreme court, residing within the judicial district of the appointee, may appoint, from time to time, one or more special deputy clerks, to attend upon any or all of the sittings of the court of which he is clerk. (Co. Civ. Proc. § 89). No clerk, deputy clerk, or special deputy clerk shall, during his continuance in office, practice as attorney or counselor of the court of which he is clerk. (Co. Civ. Proc. § 61). But this section does not preclude a member of a firm, the other partner of which has been appointed clerk of a county, from carrying on the firm's causes in that court even before a substitution. (*Cronin v. O'Reilly*, 26 N. Y. St. Rep. 249). The clerk of each court must keep his office open for the transaction of business, every day in the year, except Sundays and public holidays, from nine o'clock in the forenoon until four o'clock in the afternoon, in the county of New York (except during the months of July and August the hours shall be from nine to two), and in each of the other counties of the state, between the thirty-first day of March and the first day of October, from eight o'clock in the forenoon to five o'clock in the afternoon, and between the thirtieth day of September and the first day of April, from nine o'clock in the forenoon to five o'clock in the afternoon. (County Law § 165). Judgments shall be entered or docketed in the office of the clerks of the courts, within the hours during which by law they are required to keep open their respective offices for the transaction of business, and at no other time. (General Rule, 8).

Sec. 7. Sheriffs.

Sheriffs may be considered as officers of the court of record, inasmuch as they are required to execute the process of all the courts of record, and many of the other mandates of the court are directed to them, or are usually served by them. The sheriff is elected once in three years, except in the counties of New York and Kings, and counties whose boundaries are the same as those of a city, where he is elected every two or four years as the Legislature shall direct, and can hold no other office during his term, and he is not eligible for the next term after the termination of his office. (Const. Art.

10 § 1). He cannot hold over, as his term is fixed by the Constitution. (Public Officers Law, § 5; Const. Art. 10, § 1). He must file his official oath with the county clerk within fifteen days after the commencement of his term, or he forfeits his office. (Public Officers Law, §§ 10, 13, 20; Const. Art. XIII, § 1). Although he has not filed his oath, his acts are valid. (Public Officers Law, § 15), but he is guilty of a misdemeanor for entering upon the performance of his duties without filing the oath. (Penal Code, § 42). He must give an undertaking, appoint an under-sheriff and such deputies as may be necessary, not exceeding one for every three thousand inhabitants of the county (County Law, §§ 180, 181, 182); all these persons constitute in law but one officer. (*Pond v. Leman*, 45 Barb. 152, 154; *Whitman v. Haines*, 21 N. Y. St. Rep. 41; *affd.* 119 N. Y. 639; *Batlett v. Halligan*, 30 N. Y. St. Rep. 449; *People ex rel. Andrus v. Board of Town Auditors*, 33 App. Div. 277, 279). The sheriff is liable for the acts of each deputy done under color of office (*McIntyre v. Trumbull*, 7 Johns. 35; *Waterbury v. Westervelt*, 9 N. Y. 598); although the deputy may be a trespasser (*Hazard v. Israel*, 1 Binney, 240; 2 Am. Dec. 438); and although the acts were not justified by the process and the sheriff did not know that the deputy had the process in his possession. (*Pond v. Leman*, *supra*). He is also responsible for all moneys received by a deputy upon process in his hands, although the process was erroneous (*People v. Dunning*, 1 Wend. 16); or although the process was directed to the sheriff of another county, if the deputy has received it and collected money under it. (*Walden v. Davison*, 15 Wend. 575). Delivery of an execution to a deputy sheriff is in contemplation of law a delivery to the sheriff, but leaving it in the place of business of the deputy is not a delivery to the sheriff. (*Burrell v. Hollands*, 78 Hun, 583). The deputy's return endorsed upon the process is conclusive against the sheriff, in any action or proceeding between him and the party issuing the process. (*Sheldon v. Payne*, 7 N. Y. 453). If the person issuing the process gives instruction to the deputy to depart from his duty, the deputy, in obeying that instruction, ceases to be a servant of the sheriff, and becomes the agent of the party, and the sheriff is not liable for his acts done under those instructions (*Mickles v. Hart*, 1 Denio, 548); but the sheriff

does not cease to be liable as to acts for which no instructions were given, or where the deputy does not follow or undertake to follow the instructions which were given to him. (*Sheldon v. Payne*, 10 N. Y. 398). If the party issuing process request the appointment of a particular person as special deputy to execute it, the sheriff is not liable to the party for the acts of such person (*Ford v. Leche*, 6 A. & E. 699; *Porter v. Viner*, 1 Chitty, 613, note); and the sheriff cannot be compelled to return process issued to such special deputy (*Harding v. Holden*, 2 M. & G. 914); but a request that a sheriff will select a particular deputy, does not make that person such a special deputy, as to relieve the sheriff from liability for his acts. (*Corbet v. Brown*, 6 D. Pr. C. 794; *Balson v. Meggatt*, 4 D. Pr. C. 557). The authority of the deputy to act or to charge the sheriff with his acts ceases with written notice from the sheriff revoking his appointment (*Edmunds v. Barton*, 31 N. Y. 495); and such notice need not be under seal. (*Ibid.*). The sheriff must reside in the county. (Pub. Off. Law, § 3). He has custody of the jails. (County Law, § 183). He is also required to keep an office in the city or village where the county courts of his county are held and, except in the counties of Kings and New York, he is required to keep his office open every day, except Sundays, and public holidays or half holidays, from nine o'clock in the morning until five in the afternoon during November, December, January, February and March of each year, and from eight to six during the rest of the year. In New York and Kings counties the hours are from nine to four the entire year. (County Law, § 184). He must file with the county clerk notice of the place where his office is kept. (*Ibid.*). A sheriff, under-sheriff, deputy sheriff, or sheriff's clerk, shall not, during his continuance in office, practice as attorney or counsel in any court. (Co. Civ. Proc. § 62). The sheriff to whom an execution is issued, or the under-sheriff or deputy sheriff holding an execution and conducting a sale of property by virtue thereof, shall not, directly or indirectly, purchase any of the property at the sale. A purchase made by him or to his use is void. (Co. Civ. Proc. § 1387). The mere fact that the purchaser at the sale (one of the defendants in the action) is the attorney for the sheriff in other matters, will not render the sale void. (*McIntyre v. Sanford*, 2 Civ. Proc. Rep. 306, .

310). But this section does not apply where the sheriff is plaintiff in an action (*Jackson v. Collins*, 3 Cowen, 89); nor does it apply to a turnkey or assistant jailer. (*Jackson v. Anderson*, 4 Wend. 481). Neither the sheriff, undersheriff, nor deputy sheriff can execute process in his own favor, or for his own benefit. (*Mills v. Young*, 23 Wend. 315; *Carpenter v. Stillwell*, 11 N. Y. 61). Sheriffs or other officers cannot be bail for any person. (*Bailey v. Warden*, 20 Johns. 129). A sheriff to whom a mandate is delivered to be executed, must, without compensation, give to the person delivering the same, if required, a minute in writing signed by him, specifying the names of the parties, and the general nature of the mandate, and the day and hour of receiving the same. (Co. Civ. Proc. § 100). He must also indorse upon an execution, directed and delivered to him, a memorandum of the day, hour and minute when he received it; this must be done upon its receipt. (Co. Civ. Proc. § 1363). If he wilfully neglects to serve or execute a mandate authorized by law to be issued in a specified proceeding, he may be fined not to exceed twenty-five dollars, and is liable to the party aggrieved for his damages sustained thereby. (Co. Civ. Proc. § 103). The sheriff has a reasonable time to serve a summons delivered to him. (*Anonymous*, 10 Wend. 572). He must use all reasonable efforts to execute process. (*Hinman v. Borden*, 10 Wend. 367). Although an execution is regular on its face, if it be in fact unauthorized and void, the sheriff may refuse to execute it and the proof of its invalidity establishes a good defense in an action against him for such refusal. (*Reid v. Stegman*, 99 N. Y. 646). The sheriff cannot take security from the judgment debtor; any money, or property tantamount thereto, he receives from the debtor, becomes the plaintiff's property. (*Adams v. Bowe*, 3 Civ. Proc. Rep. 191). He may command the power of the county to overcome any resistance to the execution of process which he finds, or which he has reasonable ground to believe, will be made. (Co. Civ. Proc. §§ 104, 2030, 3158). If the officer has no authority to do the act, for the accomplishment of which he summons the aid of a bystander, the latter is not bound to obey and, if he does, he is a trespasser. (*Elder v. Morrison*, 10 Wend. 128). But where the officer has a warrant valid on its face, he and those who assist him, at

his request, in the proper execution thereof, are protected. (*Doolittle v. Doolittle*, 31 Barb. 312; *Arrex v. Brodhead*, 19 Hun, 269; *Slater v. Wood*, 9 Bosw. 15). When serving a process, the sheriff must, upon request of the person served, deliver to him a copy thereof without compensation. (Co. Civ. Proc. § 101). When he has executed process, a sheriff must make a return thereof of his proceedings, under his hand. (Co. Civ. Proc. § 102). Such return may be made by depositing the mandate in a post office, properly inclosed in a post-paid wrapper, addressed to the clerk at the place where his post office is situated. (Co. Civ. Proc. § 102). It is the duty of the sheriff to return process without order of the court. (*Hinman v. Brees*, 13 Johns. 529). At any time after the day when it is the duty of the sheriff to return, deliver, or file any process or other paper, by the provisions of the Code of Civil Procedure or by the rules of the courts, any party entitled to have such act done, may serve on the officer a notice to return, deliver, or file such process, or other paper, as the case may be, within ten days, or show cause, at a special term to be designated in said notice, why an attachment should not issue against him. (General Rule, 6; Co. Civ. Proc. § 2270). The court may by an order compel the sheriff to return the process. (*Bowie v. Brahe*, 4 Duer, 676). But the court will only direct that process shall be returned, and will not instruct the sheriff what return shall be made thereon. (*Matter of Steamship Circassian*, 50 Barb. 490). The court has power to punish a sheriff, as for contempt, for disobedience of such order, or for a wilful neglect to execute the process. (Co. Civ. Proc. §§ 14, 103). Where a return is made by the sheriff, in pursuance of an order from which an appeal has been taken, it should be cancelled, if the order be reversed on the appeal. (*The Benedict &c. Man'fact. Co. v. Thayer*, 21 Hun, 614). Every notice or other paper which is required to be served on any sheriff, may be served by leaving the same at the office designated by him in such notice, during the hours for which it is required to be kept open, but if there be any person belonging to such office therein, such notice or paper shall be delivered to such person; and every such service shall be deemed equivalent to a personal service on such sheriff. (County Law, § 184). The sheriff, or his under-sheriff, or

one of his deputies, must attend every term of the appellate division of the supreme court, (Co. Civ. Proc. § 242), and the trial and special terms of that court, and every term of the county court held in his county (*Ex parte Minier*, 2 Hill, 411); and, except in New York and Kings counties, he must within a reasonable time, before the sitting in his county, of any term of court, notify, in writing and personally, a sufficient number of constables to attend upon said court. (Co. Civ. Proc. §§ 97, 98). Every constable so notified must attend accordingly, and for each day's neglect he may be fined by the court, at the term which he was notified to attend, a sum not exceeding five dollars. (Co. Civ. Proc. § 99). The sheriff is authorized to notify only constables to attend upon the courts, and no person can be paid for such attendance, unless he is a constable. (*Day v. Mayor, etc.*, 66 N. Y. 592). The sheriff must act as crier of the court if required to do so. (Co. Civ. Proc. § 92). The county clerk must furnish to a sheriff, newly elected or appointed and who has qualified and given the security required by law, a certificate stating that the person so elected or appointed has so qualified and given security. (Co. Civ. Proc. § 182). "Qualified" means only taking the oath of office. (*Curtis v. Kimball*, 12 Wend. 275). Upon the commencement of the new sheriff's term of office, and the service of the certificate, on the former sheriff, the latter's powers as sheriff cease, except as otherwise expressly prescribed by law. (Co. Civ. Proc. § 183). The mailing on December 30, 1897, of a summons to the outgoing sheriff, and his receipt of it on January 1, 1898, having had no certificate served on him by the person elected to succeed him, as required by sections 182 and 183, constitute a valid attempt to commence an action within the meaning of section 399 of the Code of Civil Procedure. (*Littlejohn v. Leffingwell*, 34 App. Div. 185). Until the certificate of the county clerk is served upon the old sheriff, he has authority to execute process. (*Ibid.*; *Curtis v. Kimball*, 12 Wend. 275). The exception in section 183 seems to refer to section 186, which provides that the old sheriff must return in his own name each mandate which he has fully executed and must proceed with and complete the execution of each mandate which he has begun to execute in the manner specified in subdivision four of section 184. This subdivision specifies the manner

of such execution or the beginning thereof, as being the collection of money on executions, or the seizure of, or levy on, money or other property in pursuance thereof. The advertisement by the sheriff of mortgaged premises, directed by a judgment of foreclosure to be sold, is a "seizure" within the meaning of this provision and the outgoing sheriff, whose term expired the day before the sale, properly conducted and completed the sale. (*Union Dime Savings Institution v. Anderson*, 83 N. Y. 174). All other mandates, the jails, all prisoners and papers relating to their confinement, and a statement in writing of the contents of all processes, orders, or commitments which have been returned and which relate to, or authorize, the custody of prisoners, are required to be delivered to his successor by the old sheriff within ten days after the service of the certificate. (Co. Civ. Proc. § 184). At the time of such delivery the outgoing sheriff must execute an instrument reciting the property, documents and prisoners delivered, and is entitled to a receipt therefor. (Co. Civ. Proc. § 185). In case there is a vacancy in the office of sheriff, the under-sheriff executes the duties of the office until a sheriff is elected or appointed. (County Law, § 181). The sheriff is paid for his services by fees, which are prescribed in section 3307 of the Code of Civil Procedure. He must perform the duties imposed on him by law, without fee or reward, except where a fee, or other compensation, is expressly allowed by law. And he shall not receive or charge a greater fee or reward for any services than is allowed by law. (Co. Civ. Proc. § 3280). And for any violation of that provision of the statute he is liable, in addition to the punishment prescribed by law for extortion, to an action in behalf of the person aggrieved, in which the plaintiff is entitled to treble damages. (Co. Civ. Proc. § 3282).

Sec. 8. Coroners.

There are four coroners in each of the counties containing a population of one hundred thousand and over and in all other counties such number, not exceeding four, as shall be fixed by the board of supervisors (Laws of 1898, Chap. 334); and they hold office for three years from and including the first

day of January succeeding their election. (County Law, § 180). They also hold over until their successors are chosen and qualified. (Public Officers' Law, § 5). In Greater New York there are four coroners in the borough of Manhattan, two in the borough of the Bronx, two in the borough of Brooklyn, one in the borough of Queens and one in the borough of Richmond; they are elected at the same general elections as are sheriffs in the several counties in which such boroughs are situated and hold office for four years. (Greater New York Charter, § 1570). A coroner is a local officer, and to be eligible he must be a resident of the county. (Public Officers' Law, §§ 2, 3). If his official oath is not filed in the office of the County Clerk within fifteen days after the commencement of his term, he forfeits the office. (Public Officers' Law, §§ 10, 13, 20; Const. Art. XIII., § 1). If he enters upon the performance of his duties without having filed the oath, his acts are valid (Public Officers' Law, § 15), but he is guilty of a misdemeanor. (Penal Code, § 42).

If the sheriff's office is vacant and there is no under-sheriff, capable of executing the duties of the office, the county judge designates one coroner to act as sheriff; the coroner so appointed must give a bond like a sheriff's undertaking. (County Law, § 187.). Until the county judge so designates, any coroner may act as sheriff. (County Law, § 190). If there is but one coroner he is entitled to execute the duties of the office of sheriff upon giving the proper undertaking. (County Law, § 188). A coroner may be punished by fine and imprisonment, or either, for misbehavior in office, for a wilful neglect or violation of duty or for disobedience to a lawful mandate of the court or a judge thereof. (Co. Civ. Proc. § 14).

If the sheriff of the county is a party to an action, or special proceeding, the coroner of the county has all the power, and is subject to all the duties, of a sheriff, in a case to which he is not a party. (Co. Civ. Proc. §§ 172, 1362). A mandate in a civil action, or special proceeding, which must, or may, be executed by the coroners, or by a coroner of a county, must be directed either to a particular coroner, or, generally, to the coroners of that county. Where such a mandate is directed generally to the coroners of a county, or requires them to do any act, it may be executed, and a return thereto

may be made and signed by one of them, but such an act or return does not affect the others. (Co. Civ. Proc. § 173). Where a mandate, requiring the arrest of the sheriff of the county, is directed to the coroner, he must execute the same, in the manner prescribed by law in respect to the execution of a similar mandate by a sheriff. And he is authorized to take an undertaking on the arrest or an undertaking for the jail liberties, to himself, in his name of office, in a like case and in like manner, and with like effect, as where such an undertaking may be taken by the sheriff. (Co. Civ. Proc. § 174). Where the actual confinement of a sheriff, by a coroner, on a mandate, is required or authorized by law, he must be confined by the coroner, in a house situated within the liberties of the jail of the county, other than the sheriff's house or the jail, in the same manner, as a sheriff is required by law to confine a prisoner in the jail (Co. Civ. Proc. § 175); and that house thereupon becomes the jail of the county, for the use of the coroner, and each provision of law relating to the jail, or to an escape from the jail, applies thereto, while the sheriff is confined therein. (Co. Civ. Proc. § 176). A person arrested by a coroner, in an action or special proceeding in which the sheriff of the county is plaintiff, must be confined in the jail of the county, in a case where such confinement is required or authorized by law; but the coroner is not liable for an escape of the prisoner from the jail after he has been confined therein. A person so confined must be kept and treated in all respects, like a prisoner confined by the sheriff. (Co. Civ. Proc. § 179). A person arrested by a coroner is entitled to be discharged, or to the liberties of the jail, as the case requires, upon giving an undertaking to the coroner, in the like manner and in a like case, in which a person arrested by the sheriff would be entitled to be so discharged, or to the liberties. The undertaking so given must be, in all respects, similar to that required to be given to a sheriff, and it has the like effect, and may be assigned and proceeded upon in like manner. (Co. Civ. Proc. § 180). A coroner is answerable for an escape of a prisoner, admitted by him to the liberties of the jail, in the same manner, and to the same extent, as a sheriff, and may interpose a like defense. (Co. Civ. Proc. § 181). A coroner is entitled, for performing any duty

of a sheriff, in an action or special proceeding, in which the sheriff is for any reason disqualified, to the same fee to which a sheriff is entitled for the same services; and for confining a sheriff in a house by virtue of a mandate, and maintaining him while there, two dollars for each day, to be paid by the sheriff, before he is entitled to be discharged. (Co. Civ. Proc. § 3310).

Sec 9. Elisors.

If the sheriff is disqualified and all the coroners successively neglect or refuse to execute the undertaking within the time required, the county judge shall appoint some suitable person to execute the duties of the office of sheriff until a sheriff shall be elected or appointed. (County Law, § 189).

Sec. 10. Attorneys and Counsellors.

Attorneys are admitted to practice by the appellate division of the supreme court, in the department in which they reside, after an examination by a board of examiners appointed by the court of appeals, and subject to the rules established by that court. (Co. Civ. Proc. § 56). An attorney must be twenty-one years of age, and a citizen of the United States, (*Matter of O'Neill*, 90 N. Y. 584), but he need not be a citizen of the State of New York, provided he has a law office in the State. (Co. Civ. Proc. § 60). Upon admission, each person admitted to practice as an attorney must take the constitutional oath of office, in open court, and subscribe the same in a roll to be kept in the office of the clerk of the appellate division of the supreme court (Co. Civ. Proc. § 59); he must also file in the office of the clerk of the court of appeals an oath, or affirmation, prescribed by the statute, showing his admission, before he begins to practice. (Laws of 1898, chap. 165, as amended by Laws of 1899, chap. 225). Attorneys are officers of the court, (*Hamilton v. Wright*, 37 N. Y. 502), but they are not officers of the State. (*Ex parte Garland*, 4 Wal. 333; *Matter of Burchard*, 27 Hun, 429). An attorney holds office during life, subject, however, to removal or suspension for cause, by the appellate division of the

supreme court. While that court alone has the power to suspend or remove an attorney for misconduct, every other court of record has control over him so far as relates to his conduct in cases in that court, when he appears therein. (*Willmont v. Meserole*, 16 Abb. Pr. 308). The Code of Civil Procedure provides, that an attorney who is guilty of any deceit, malpractice, crime or misdemeanor, or who is guilty of any fraud or deceit in the proceedings, by which he was admitted to practice, as an attorney and counsellor of the courts of this State, may be suspended from practice, or removed from office, by the appellate division of the supreme court. (Co. Civ. Proc. §§ 56, 67). Malpractice as a lawyer means evil practice in a professional capacity, and the resort to methods and practices unsanctioned and prohibited by law. (*Matter of Baum*, 30 St. Rep. 174). It is the duty of the supreme court in exercising the power thus granted to it, to cause charges to be preferred against the attorney, whenever it is satisfied from what has occurred in its presence, or from any satisfactory proof, that a cause exists where the public good and the ends of justice require that to be done. (*In re Percy*, 36 N. Y. 651). Such proceedings must be instituted either by presentation of an affidavit, or other authenticated papers containing the charge to be investigated to the appellate division, or by an order of some court, alleging the misconduct (*Matter of Brewster*, 12 Hun, 109); but they cannot be commenced by notice of motion, founded upon affidavits; the proceeding must originate in the action of the appellate division itself. (*Ibid.*). The proceeding to punish an attorney for misconduct is a summary proceeding and not an action. (*Foster v. Townshend*, 68 N. Y. 203; *Matter of Burchard*, 27 Hun, 429). A copy of the charges must be delivered to the attorney, before he is removed, and he must be allowed an opportunity of being heard in his defense. (Co. Civ. Proc. § 68). Where the papers, being verified, substantially show the charges against the attorney, and the proofs which will be offered to sustain them, it is no objection to them that they are not formally correct. (*Matter of an Attorney*, 86 N. Y. 563). On the hearing the attorney is not entitled to trial by jury. (*Matter of Eldridge*, 82 N. Y. 161, 167). If a trial of the charges against him is necessary, he is entitled to confront the witnesses,

and he can only be convicted by evidence given in accordance with the common law rules, in his presence, by witnesses subject to cross examination, (*Matter of Eldridge, supra; Matter of an Attorney*, 83 N. Y. 164), and a commission to take testimony against him in a foreign state cannot be issued without his consent. (*Ibid.*). These rules, however, are for the protection of the attorney. If evidence against him is given by affidavit, or deposition, without his objection, he is deemed to have consented to it, and he can not object on appeal, that he had a right to some other mode of trial. (*Matter of an Attorney*, 86 N. Y. 563). Refusal of an attorney to testify in a proceeding to disbar him raises a presumption of the truth of such contradicted facts as must have been known to him. (*Matter of Randel*, 158 N. Y. 216). An attorney may be removed from his office for general bad character, or bad conduct. (*Matter of Percy*, 36 N. Y. 651). An attorney upon conviction for felony ceases to be an attorney and counsellor, or to be competent to practice law as such. (Co. Civ. Proc. § 67). Whenever he is convicted of a felony, there may be presented to the appellate division of the supreme court, a certified or exemplified copy of the judgment of such conviction, and thereupon his name shall, by order of the court, be stricken from the roll of attorneys. (*Ibid.*). His right to act as attorney is not restored after such conviction, by a pardon, (*Matter of an Attorney*, 86 N. Y. 563, 569, 573; *Matter of E.* 65 How. Pr. 171), but upon a reversal of a conviction or a pardon, the appellate division has power to vacate or modify the order disbaring him. (Co. Civ. Proc. § 67). Although where an attorney commits an indictable offense, he will not ordinarily be removed from office before conviction, yet the court, if it sees fit, may, in its discretion, try him by summary proceedings and disbar him before he has been tried, upon the indictment. (*Ex parte Wall*, 107 U. S. 265; *Rochester Bar Assoc. v. Dorthy*, 152 N. Y. 596). In the latter case the court said, however, that where the charge involved a felony or misdemeanor entirely distinct from the defendant's professional action, the court would stay its hand until the criminal trial had been had. (p. 598). Among the offences for which attorneys have been removed are the altering of a verification (*Matter of Loew*, 50 How. Pr. 373; 5 Hun, 462); manufacturing

evidence (*Matter of Gale*, 75 N. Y. 526); forging a fictitious certificate of divorce (*Matter of Petersen*, 3 Paige 510); charging a judge in his own court with corruption and persisting in the charge (*Matter of Murray*, 33 N. Y. St. Rep. 831); and the conversion of money delivered to him by his client. (*Matter of Burd*, 9 Weekly Dig. 562). Where, in a proceeding for the probate of a will, an attorney introduced the deposition of a witness, and it appeared that he prepared and caused to be written out all the answers to be given by the witness to the interrogatories and cross-interrogatories, that he was present when the testimony was taken, and himself read to the commissioners the answers he had prepared to the interrogatories, and left with the witness the answers so prepared to the cross-interrogatories, which the latter read to the commissioner, and that he paid money to the witness both before and after the taking of the testimony, and that he afterwards wrote to the witness, suggesting a destruction of their correspondence, and asking for a return of the memoranda so used at the taking of the deposition, it was held that the attorney was properly convicted of professional misconduct, and suspended from practice. (*Matter of Eldridge*, 82 N. Y. 181). Where it appeared that an attorney assisted at the lynching of a man, his name was stricken from the roll (*Ex parte Wall*, 107 U. S. 265); and a threat of chastisement out of court, to a judge, for his conduct during the trial of a cause then pending, was held to be good ground for disbarring the attorney from practice in that court. (*Bradley v. Fisher*, 13 Wal. 335). Where it appeared that an attorney prosecuted a pension for a client, and received the arrears of pension and the monthly allowance, for some months, amounting to about \$1,700, out of which he retained \$1,200, and he alleged that it was agreed with his client, that he was to retain all over \$8 per month of the amount paid, and it did not appear that the client was informed how much over that sum he was entitled to, it was held that the agreement was unconscionable, and justified the general term in holding that the transaction indicated a depraved professional morality, and in removing the attorney from office. (*Matter of an Attorney*, 86 N. Y. 563; see also, *Matter of V—*, 10 App. Div. 491; *Matter of Randel*, 158 N. Y. 216). It has been held that an attorney can not be disbarred for acts committed by him as

a party to an action, and not as an attorney, though the acts show that he was engaged in a fraudulent conspiracy of unparalleled enormity (*Matter of Post*, 26 St. Rep. 641); but in view of the cases cited above, it would seem that such conduct indicated general bad character, or was misconduct, for which an attorney might properly be disbarred. (See also *Matter of Forster*, 49 Hun, 114). An attorney who violates section 73 or 74 of the Code of Civil Procedure must be disbarred. (Co. Civ. Proc. § 75; see *infra*, pp. 35, 36). The suspension or removal of an attorney by the supreme court operates as a suspension or removal in every court of the state. (Co. Civ. Proc. § 69).

The court will also proceed in a summary manner to control an attorney in his relations with his client, as to compel him to pay money received in his capacity as attorney (*Ex parte Statts*, 4 Cow. 76; *Matter of Bleakley*, 5 Paige 311; *People v. Wilson*, 5 Johns. 368; *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489; *Matter of Knapp*, 85 N. Y. 284; *Matter of Chittenden*, 4 N. Y. St. Rep. 606; *affd.* 105 N. Y. 679; *Matter of Silvernail*, 45 Hun, 575; *Waterbury v. Eldridge*, 5 N. Y. Supp. 324); or to return a paper received by him as such (*Matter of H., an attorney*, 87 N. Y. 521); or to settle his accounts with his client and turn over property to which he may be entitled. (*Kuhne v. Daily*, 23 Hun, 282; appeal dismissed, 89 N. Y. 631). An attorney who purchases at his client's execution sale, and sells the property at an advance, may be compelled to account for and pay over the profits derived, in a summary proceeding. (*Matter of Friedman*, 27 Hun, 301); but the court will only permit these summary proceedings in case the money sought to be recovered was received by the attorney in his professional capacity. (*Matter of Husson*, 26 Hun, 130; *affd.* 89 N. Y. 618). It is within the discretion of the court whether it will proceed by attachment to compel the payment by an attorney to his client, of money received in that capacity, or leave the client to his action. (*Matter of Schell*, 128 N. Y. 67). The discretion of the supreme court will not be reviewed by the court of appeals. (*Ibid.*). Where an attorney becomes surety for costs, he cannot be proceeded against summarily, as an officer of the court, but must be pursued in the same manner as any other surety. (*Willmont v.*

Meserole, 16 Abb. Pr. N. S. 308). The remedy by summary proceedings is usually sought where a dispute has arisen as to the attorney's fees and, if he claims a lien for such fees, the usual course is to order a reference. (*Matter of Gillespie v. Mulholland*, 12 Misc. 40; *Matter of Knapp*, 85 N. Y. 284, and cases cited *supra*); but where the court can readily determine the extent and value of the services, the matter will not be sent to a referee. (*Waterbury v. Eldridge*, 5 N. Y. Supp. 324; *Ferdon v. Ferdon*, 1 App. Div. 629). The court enforces its orders in such summary proceedings by attachment. (*Bowling Green Savings Bank v. Todd*, 52 N. Y. 489, and cases cited *supra*). The court will not order summary proceedings in favor of one retained as counsel (*Matter of Haskin*, 18 Hun, 43); nor in favor of one attorney, as against another (*Matter of Cattus*, 42 App. Div. 134; *Taylor v. L. I. R. R.*, 38 App. Div. 595); nor in favor of an attorney who acts solely as an agent or attorney in fact for the collection of money (*Matter of Hillebrandt*, 33 App. Div. 191; but see *Matter of Dakin*, 4 Hill, 42; *Grant v. Chester*, 17 How. Pr. 260); nor in favor of an assignee of a claim (*Matter of Schell*, 58 Hun, 440; but see remarks of O'Brien, J., on appeal to court of appeals, 128 N. Y. 67, 69, 70, and *Matter of Gillespie v. Mulholland*, 12 Misc. 40); *quære* as to moneys collected by virtue of a retainer in another court (*Matter of Ketchum*, 4 Hill, 564, and *Matter of Forster*, 49 Hun, 114, holding in the negative, *Matter of Batterson*, 44 N. Y. St. Rep. 839 in the affirmative); nor to compel an attorney to carry out a stipulation (*Berks v. Hotchkiss*, 82 Hun, 27); nor unless the petitioner's claim is free from any reasonable doubt (*Matter of Post*, 31 N. Y. St. Rep. 123); nor after suit brought by the client (*Cottrell v. Finlayson*, 4 How. Pr. 242; *Bohanan v. Peterson*, 9 Wend. 503; *Gabriel v. Schillinger Co.* 24 Misc. 33, *contra*); nor without a demand. (*Matter of Ferguson*, 6 Cow. 596). The court will punish disobedience of its order directing payment by an attorney as a contempt. (*Matter of McBride*, 6 App. Div. 376; *Matter of Bornemann*, 6 App. Div. 524); and the order cannot be attacked collaterally. (*Matter of Bornemann*, *supra*).

An attorney or counsellor who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or a party, or who wilfully delays his

client's cause, with a view to his own gain, or wilfully receives money, or an allowance for or on account of money, which he has not laid out, or becomes answerable for, forfeits to the party injured treble damages. (Co. Civ. Proc. §§ 70, 71). These sections relate to a case where the attorney intends to deceive the court or his client by some improper practice; they do not include a transaction before proceedings have been commenced, as the court could have no connection with any such proceeding. The "party" referred to in these sections is the party to an action pending in a court, in reference to which the deceit is practiced, and not a person outside, not connected with the same at the time, or with the court. (*Looff v. Lawton*, 97 N. Y. 478). If an attorney knowingly permits a person, not being his general law partner, or a clerk in his office, to sue out a mandate, or to prosecute or defend an action, in his name, he and the person who so uses his name, each forfeit to the party, against whom the mandate has been sued out, or the action prosecuted or defended, the sum of fifty dollars to be recovered in an action. (Co. Civ. Proc. § 72). An attorney may, however, employ one who is such, as his clerk to represent him, and use the name of the attorney. (*Brush v. Lee*, 36 N. Y. 49). The issuing of a subpoena is within the prohibition of this statute; a subpoena being held to be process. (*Yorks v. Peck*, 31 Barb. 350). An attorney or counsellor shall not directly or indirectly buy, or be in any manner interested in buying, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon. (Co. Civ. Proc. § 73). To bring the case within the prohibition of this section, the direct and specific purpose of the purchase, exclusive of any other, must have been to enable the attorney to bring an action; the section does not embrace a case where some other purpose induced the purchase and the intent to sue was merely incidental and contingent. (*Moses v. McDivitt*, 88 N. Y. 62; *Fay v. Hebbard*, 42 Hun, 490). The mere fact of the purchase does not warrant a conclusion that there was an intent to violate the statute. (*Williams v. Matthews*, 3 Cow. 252). The statute was not intended to prevent a purchase for the purpose of protecting some other right of the assignee; as to protect an interest

in real estate covered by a mortgage; (*Baldwin v. Latson*, 2 Barb. Chan. 306); nor the buying by an attorney who is a junior judgment creditor, of the senior judgment for the purpose of collecting his own (*Van Rensselaer v. Sher. of Onondaga Co.*, 1 Cow. 443); nor the taking of property from the client, as compensation for services. (*Fowler v. Callan*, 102 N. Y. 395). It does not prohibit an attorney from buying a mortgage with the intent to foreclose it by advertisement, this mode of foreclosure not being a suit in any court, within the meaning of the statute. (*Hall v. Bartlett*, 9 Barb. 297). Within this statute it is lawful for an attorney to buy a judgment for the purpose of enforcing it by execution, (*Fay v. Hebbard*, 42 Hun, 490), or to buy a claim upon which suit has been commenced. (*Wetmore v. Hegeman*, 88 N. Y. 69). Neither is it a violation of the statute for an attorney to buy the fee of land for the purpose and with the intent of getting possession of it by an action. (*Townsend v. Frommer*, 16 N. Y. St. Rep. 892). The section does not prohibit an attorney from taking a bond, as collateral security, with the intent of suing on it, if necessary to collect it. (*West v. Kurtz*, 15 Daly, 99). Where an attorney purchased a bond and mortgage, paying for them with his note due in two and a half months, within an hour made search against the premises, and immediately began a foreclosure action, the purchase was held to be forbidden by section 73, in the absence of some satisfactory explanation (*Maxon v. Cain*, 22 App. Div. 270). The purchase by an attorney of a claim against a decedent's estate, at the request, and for the accommodation, of the claimant without any intent to derive a benefit therefrom personally, is not within the section. (*Tilden v. Aitkin*, 37 App. Div. 28). An attorney or counsellor shall not by himself or in the name of another person, either before or after action brought, promise or give or procure to be promised or given, a valuable consideration to any person as an inducement to placing or in consideration of having placed in his hands, or in the hands of another person, a demand of any kind for the purpose of bringing an action thereon. (Co. Civ. Proc. § 74). This section and section 73 above cited are a substantial reenactment of the revised statutes. They forbid, first, the purchase by an attorney, for the purpose, and with the intent of

bringing a suit thereon, and, second, any loan or advance, or agreement to loan or advance "as an inducement to the placing or in consideration of having placed in the hands of an attorney" any demand for collection. (*Fowler v. Callan*, 102 N. Y. 395; *Hess v. Allen*, 24 Misc. 393). The section forbids an agreement whereby an attorney, taking a case on a contingent fee, agrees to advance money necessary to carry on the case. (*Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 443). The violation of section 74, however, does not constitute a defence to the action on the principal claim. (*Story v. Satterlee*, 13 Daly 169). This section does not apply to an agreement between attorneys and counsellors, or either, to divide between themselves the compensation to be received (Co. Civ. Proc. § 74). An attorney who violates section 73 or 74 is guilty of a misdemeanor, and on conviction must be removed from office by the supreme court. (Co. Civ. Proc. § 75). But the two sections last cited do not prohibit the receipt by an attorney or counsellor of a bond, promissory note, bill of exchange, book debt, or any thing in action, in payment for property sold, or for services actually rendered, or for a debt antecedently contracted; or from buying or receiving a bill of exchange, draft or other thing in action, for the purpose of remittance, and without intent to violate either of those sections. (Co. Civ. Proc. § 76). Sections 73, 74, 75 and 76 do not apply to a person prosecuting an action in person. (Co. Civ. Proc. § 77). No attorney or counsellor shall be surety on any undertaking or bond required by law, or by the rules, or by any order of a court, or judge, in any action or proceeding, nor shall he be bail in any case, civil or criminal. (General Rule 5). Although an attorney's name still appears on the roll, he can become a surety if he has abandoned the practice of law. (*Evans v. Harris*, 47 N. Y. Super. 336; *Storingham v. Stewart*, 8 N. Y. Civ. Proc. Rep. 420). No person shall ask or receive, directly or indirectly, compensation for appearing as an attorney in court or before any magistrate in the city of New York, or make it a business to practise as an attorney, in a court or before a magistrate, in said city, unless he has been regularly admitted to practise as an attorney and counsellor, in the courts of record of this state. (Co. Civ. Proc. § 63). Where any person conducts a cause to the end in violation of this section, the judgment

rendered is void and must be reversed. (*Newberger v. Campbell*, 58 How. Pr. 313). If an attorney dies, is removed, or suspended, or otherwise becomes disabled to act, at any time before judgment in an action, no further proceedings shall be taken in the action, against the party for whom he appeared, until thirty days after notice to appoint another attorney has been given to that party, either personally, or in such other manner as the court directs. (Co. Civ. Proc. § 65). This section has no application to a case where the attorney died after the entry of judgment, and so notice of motion to set aside a judgment rendered before the death of an attorney is properly served after his death upon the party personally. (*Chilson v. Howe*, 17 Civ. Proc. Rep. 86). The notice required by section 65 must be given to all the parties to the action, if there is more than one for whom the attorney has appeared. (*Hickox v. Weaver*, 15 Hun, 375). After the notice required by this section, the proceedings are stayed for thirty days, and a motion to dismiss an appeal for failure to appoint an attorney, made within that time, is premature, and notice of the argument on appeal can not be given until after that time. (Ibid.). If a party, after notice, fails to appoint a new attorney, notice of any subsequent proceedings may be given to him personally, after the thirty days have expired. (*Hoffman v. Rowley*, 13 Abb. Pr. 399; *Jewell v. Schouten*, 1 N. Y. 241). If one of a firm of attorneys, who has appeared for a party, dies, the service of a notice of trial upon surviving partners is regular and sufficient. (*Saxton v. Dodge*, 46 How. Pr. 467); but where an attorney has become a non-resident of the state, papers cannot be served on his former partner. (*Diefendorf v. House*, 9 How. Pr. 243). Where a verdict has been rendered in a foreclosure suit and the judge had under consideration the issues in the case when the defendant's attorney was disbarred, a judgment subsequently rendered, without notice to the defendant, under this section and the sale and all proceedings thereunder were set aside. (*Com'l Bk. v. Foltz*, 13 App. Div. 603). An attorney or counsellor is privileged from arrest during the actual sitting of a court, provided he is employed in a cause to be heard at that term of court. (Co. Civ. Proc. § 565). Attorneys, however, are not privileged while appearing before a judge out of court. (*Cole v. McClellan*, 4 Hill, 59).

This privilege is lost by ceasing to practice for one year, not in consequence of any temporary absence or avocation, but if the attorney betake himself to a practice or business, incompatible with his practice as an attorney. (*Brooks v. Patterson*, 2 Johns. Cas. 102). The authority of any attorney to appear for any party is presumed. (*Hamilton v. Wright*, 37 N. Y. 502; *Matter of Maxwell*, 66 Hun, 151). But the court may at all times inquire into his right, and the attorney may be compelled to show under what authority he practices. (*Ninety Plaintiffs v. Vanderbilt*, 1 Abb. Pr. 193). Ordinarily, however, this will not be done unless the circumstances are such as raise a suspicion of fraud. (*Hollins v. St. Louis & Chicago Ry. Co.* 57 Hun, 139; *Stewart v. Stewart*, 56 How. Pr. 256; *Rep. of Mexico v. Arrangois*, 5 Duer, 643). The code, however, provides that, in an action to recover real property, or the possession thereof, the defendant, at any time before answering, upon affidavit that evidence of the authority of the plaintiff's attorney to commence the action has not been served upon him, may apply, upon notice, to the court or a judge thereof, for an order directing the attorney to produce such evidence (Co. Civ. Proc. § 1512), and upon such application, the court or judge must make an order, requiring the plaintiff's attorney to produce evidence of his authority to commence the action, and staying all proceedings therein on the part of the plaintiff, until the evidence is produced. (Co. Civ. Proc. § 1513). This order must state the place at which the authority is required to be presented. (*Turner v. Davis*, 2 Denio, 187).

The court has power, in its discretion, to make an order requiring the plaintiff's attorney to disclose his client's address, and when it is made to appear that such knowledge is necessary to enable the opposite party to take some step in the cause, the order is promptly granted. (*Drake v. N. Y. Iron Mine*, 75 Hun, 539; *Havana City R. Co. v. Ceballos*, 25 Misc. 660; *Post v. Scheider*, 36 St. Rep. 324); but the court will not exercise this power, after a litigation is ended. (*Walton v. Fairchild*, 24 N. Y. St. Rep. 314); and in a proper case the court will stay all proceedings until the address is furnished. (*Corbett v. Gibson*, 18 Hun, 49; *Corbett v. De Comean*, 45 N. Y. Super. 637). A parol retainer is sufficient to entitle an attorney to appear. (*McAlexander v. Wright*,

3 T. B. Monroe, 189; 16 Am. Dec. 93 and note on page 98; *Osborne v. U. S. Bank*, 9 Wheat. 738), except in an action of ejectment, in which it is required that an attorney should produce a written request of the plaintiff or his agent, or a written recognition of his authority to appear, properly verified. (Co. Civ. Proc. § 1514). By virtue of his retainer, the attorney becomes the authorized agent of the party, in all matters necessary to the conduct of the case. (*Barrett v. Third Avenue R. R. Co.* 45 N. Y. 628; *Mark v. The City of Buffalo*, 87 N. Y. 184). Within this authority, he may discontinue a suit, although he cannot release a cause of action. (*Barrett v. Third Avenue R.R. Co.*, *supra*; *Gaillard v. Smart*, 6 Cow. 383). He cannot, therefore, make a valid confession of judgment unless he is authorized so to do. (*Bush v. O'Brien*, 164 N. Y. 205, and cases there cited). He may extend the time to appeal (*Hoffenbruth v. Miller*, 12 Abb. N. S. 282); or to open a default (*Read v. French*, 28 N. Y. 285), if it is plain the court would order it opened, in accordance with well-settled rules of practice. (*Anon.* 1 Wend. 108; *Clusman v. Markel*, 3 Bosw. 402). He may stipulate as to the referee's fees in an action (*Mark v. City of Buffalo*, 87 N. Y. 184), or incur the necessary expenses for preparing for trial; such as employing an accountant to examine books as an expert. (*Covell v. Hart*, 14 Hun, 252). In an action against a railroad company for damages for negligence, the attorney for the defendant may stipulate, as a condition of receiving a favor, that if the plaintiff die before judgment, the cause of action shall survive. (*Cox v. N.Y.C. & H. R. R.R. Co.* 63 N. Y. 413). The attorney, after judgment, may issue an execution against property (*Walradt v. Maynard*, 3 Barb. 584), or against the person (*Guilleman v. Rowe*, 94 N. Y. 268); or he may withdraw an execution. (*Read v. French*, 28 N. Y. 285; *Corning v. Southland*, 3 Hill, 552). He may give instructions to the sheriff as to his proceedings under the execution. (*Corning v. Southland*, *supra*; *Averill v. Williams*, 4 Denio, 295). After judgment, the attorney employed to collect a claim has authority to institute supplementary proceedings. (*Ward v. Roy*, 69 N. Y. 96). He may satisfy a judgment within two years (Co. Civ. Proc. § 1260), on payment of full amount (*Beers v. Hendrickson*, 45 N. Y. 665); and only on payment of the

full amount. (*Lowman v. E. C. & N. R. R. Co.*, 85 Hun, 188; affd. 154 N. Y. 765). He may also direct the sheriff to discharge a debtor held on an execution against the person. (*Davis v. Bowe*, 118 N. Y. 55). Under a general authority to collect a note, an attorney is authorized to receive a payment of part in money and the residue in the note of a person of undoubted responsibility for a short period. (*Livingston v. Radcliff et al.* 6 Barb. 201; appeal dismissed, 2 N. Y. 189). Where several persons join in a suit by one attorney, the court will not inquire whether the same is authorized by such parties, unless some of them object to the proceeding, or the adverse party show affirmatively that the suit has been improperly instituted without authority. (*Bank Com'rs. v. Bank of Buffalo*, 6 Paige, 497, 504). An attorney, by virtue of his general retainer, is authorized to bring a second suit on a note, after being non-suited in the former one. (*Scott v. Elmendorf*, 12 Johns. 317). Counsel have authority to amend at the trial, regardless of the attorney of record. (*Devlin v. Mayor, etc.*, 15 Abb. Pr. N. S. 31, 37). A counsel retained to argue a motion to change the place of trial can consent to a reference of the cause, on the suggestion of the court. (*Tiffany v. Lord*, 40 How. Pr. 481). An attorney may, also, bind his client by a stipulation not to appeal. (*Smith v. Barnes*, 9 Misc. 368). If an attorney does an act not binding on his client and the client accept the benefit thereof, he cannot be heard to object that the attorney had no authority. (*Chadwick v. Manning*, 27 N. Y. St. Rep. 31; *Ives v. Ives*, 80 Hun, 136). But the attorney has not, under his original retainer, authority to employ counsel. (*Matter of Bleakley*, 5 Paige, 312; *Cook v. Ritter*, 4 E. D. Smith 253). Nor can he bid, in the name of his client, on the sale of real estate under an execution, issued upon his client's judgment. (*Beardsley v. Root*, 11 Johns. 464). He cannot stipulate, upon an appeal to the general term, to vacate the judgment, and permit a new trial to be had. (*Quinn v. Lloyd*, 5 Abb. Pr. N. S. 281; 7 Robt. 538). The attorney cannot bind his client by submission to arbitration. (*McPherson v. Cox*, 86 N. Y. 472; *Stinerville &c. Co. v. White*, 25 Misc. 314). He cannot, by stipulation, permit the taxation of a greater amount of costs than are allowed by law. (*O'Keefe v. Shepard*, 21 Hun, 171). Nor can counsel,

employed to argue a demurrer, consent, where his default has been taken, as a condition of opening the default, that a decision of the demurrer should be final. (*Baron v. Cohen*, 62 How. Pr. 367). The power of an attorney to bind his client in an action, against the instructions of the client is limited to acts which conduce, or tend to conduce, to the success of his client. He cannot withdraw the answer, when such an act amounts to a confession of judgment, and leave it to a sheriff's jury to assess the damages. (*Herbert v. Lawrence*, 42 St. Rep. 406; 18 Supp. 95). An attorney's admissions in conversation with third persons do not bind his client. (*Lewis v. Duane*, 141 N. Y. 302; *Fay v. Hebbard*, 4 N. Y. St. Rep. 485). If the attorney directs the sheriff to arrest the wrong person, his client is not liable, such direction being beyond his authority (*Gearon v. Bank for Savings*, 6 Civ. Proc. Rep. 207); nor does he subject his client to liability in directing a levy upon final process (*Welsh v. Cochran*, 63 N. Y. 181); but the attorney has power to direct the officer in making an attachment issued during the progress of the action and his mistake renders the client liable. (*Oestrich v. Gilbert*, 9 Hun, 242). An attorney is not answerable for the stenographer's fees in an action, in the absence of a special agreement, the employment of a stenographer being within his authority (*Bonyng v. Field*, 81 N. Y. 159; *Bonyng v. Waterbury*, 12 Hun, 534); the client is liable. (*Harry v. Hilton*, 64 How. Pr. 199). As to an attorney's authority to employ experts, see *Brown v. Travellers Ins. Co.* (21 App. Div. 42). An attorney of a party in a partition suit has no power under his original employment, more than a year after judgment, to consent to the entry of orders *nunc pro tunc*. (*Walter v. De Graef*, 19 Abb. N. C. 406). The attorney has no right, without the consent of his client, to appeal from an order denying an allowance in addition to costs. (*Smith v. City of Rochester*, 4 Alb. L. J. 12). An attorney cannot stipulate to release one of several defendants, after judgment, without payment. (*Carstens v. Barnstorf*, 11 Abb. Pr. N. S. 442). Relief against a judgment rendered against a party upon the unauthorized appearance of an attorney is to be sought in a direct application to the court by motion in the action in which the unauthorized appearance was entered. (*Denton v. Noyes*, 6 Johns. 297;

Grazebrook v. M'Creddie, 9 Wend. 437; *Adams v. Gilbert*, 9 Wend. 499; *Campbell v. Bristol*, 19 Wend. 101; *American Ins. Co. v. Oakley*, 9 Paige, 946; *Allen v. Stone*, 10 Barb. 547; *Hamilton v. Wright*, 37 N. Y. 302; *Vilas v. P. & M. R. R. Co.*, 123 N. Y. 441). The cases last cited show that a judgment entered upon an unauthorized appearance is neither void nor irregular. The court has power in its discretion to set aside the judgment, but it will not do so unless the application is made promptly. (*Abbet v. Blohm*, 54 App. Div. 422). The authority of the attorney cannot be questioned collaterally. (*Brown v. Nichols*, 42 N. Y. 31; *Ferguson v. Crawford*, 70 N. Y. 256; *Sperry v. Reynolds*, 65 N. Y. 183; *Washburn v. Cope*, 144 N. Y. 287; *Donohue v. Hungerford*, 1 App. Div. 528). Where a judgment is entered on an unauthorized appearance, the attorney, so appearing, may be required to pay the judgment. (*Post v. Charlesworth*, 66 Hun, 256). The relation of attorney and client is ended by the entry of judgment against the client (*Lust v. Hastings*, 1 Hill, 656), or in his favor (*Ward v. Sands*, 10 Abb., Pr., N. S. 60; *Lyon v. Cahill*, 13 Civ. Proc. Rep. 314); except that the attorney may issue execution and take the necessary steps to collect the judgment and in the absence of a revocation of his authority, may execute a satisfaction of the judgment within two years after its entry. (*Cruikshank v. Goodwin*, 49 St. Rep. 603, 20 Supp. 757). After the entry of judgment, a new attorney can be employed without an order of substitution. (*Davis v. Solomon*, 25 Misc. 695; *Egan v. Rooney*, 38 How. Pr. 121). This relation also ends by the death of the client. (*Austin v. Monroe*, 4 Lans. 69; *Adams v. Nellis*, 59 How. Pr. 385; 39 Am. Dec. 91, note). The client has the right to change his attorney at pleasure (*Mumford v. Murray*, Hopk. 369; *Ogden v. Devlin*, 45 Super. 631); except where the effect of the change will be to bargain away the rights of other persons who are interested in the action, and for whose benefit, as well as for that of the plaintiff, the action is brought (*Hirschfeld v. Bopp*, 5 App. Div. 202); but the change can only be made by an order of the judge or the court, and upon such terms as may be just (General Rule 10), and in no case can such a change be made simply by the consent of the attorney himself, but the fact that the client has agreed to it must be made to appear. (*Buckley v. Buckley*, 45 St. Rep. 827;

18 Supp. 607). Both the order and a notice of substitution must be served; if either is lacking, the opposite party may disregard the notice and return a paper received from the attorney sought to be substituted. (*Parker v. Williamsburgh*, 13 How. Pr. 250; *Miller v. Schall*, 67 Barb. 446; *contra*, *Dorlon v. Lewis*, 7 How. Pr. 132, that notice of substitution is sufficient alone). An appeal to the appellate division from a judgment cannot be taken by a new attorney, until he has been properly substituted, and service of a notice of appeal by the new attorney, before such substitution is ineffectual. (*Shuler v. Maxwell*, 38 Hun, 240; appeal dismissed, 108 N. Y. 636; *Pensa v. Pensa*, 3 Misc. 417). But on an appeal to the court of appeals, from a judgment of the appellate division, a party may retain a new attorney, without obtaining an order of substitution, and on such retainer the authority of the old attorney ceases. (Rule 3, Court of Appeals Rules; *Magnolia Metal Co. v. Sterlingworth, &c. Co.*, 37 App. Div. 366; but see *Squire v. McDonald et al.* 138 N. Y. 554). Where a substitution of attorneys has been made, after an appeal to the Court of Appeals, a motion to direct the former attorney to deliver the papers to the substituted attorney should not be made in the Court of Appeals, but to the court below. (*Peo. ex rel. Hoffman v. Board of Education*, 141 N. Y. 86). The attorney has a lien on the papers in his hands for his reasonable charges, and a transfer of such papers will not be ordered until the charges are paid (*Ogden v. Devlin*, *supra*; *Supervisors v. Brodhead*, 44 How. Pr. 411; *Hoffman v. Van Nostrand*, 14 Abb. Pr. 336), or security given for the payment. (*Cunningham v. Widing*, 5 Abb. Pr. 314). The order should provide for a reference to ascertain the amount of the fees, if they are in dispute. (*Ogden v. Devlin*, *supra*; *Phila. v. Postal Telegraph Cable Co.*, 1 App. Div. 387). Where, however, the attorney has been guilty of misconduct, the court will direct a substitution, and leave the attorney to an action for his fees. (*Pierce v. Waters*, 10 Wk. Dig. 432; *Matter of Prospect Ave.*, 85 Hun, 257; *Barkley v. N. Y. C. & H. R. R. Co.*, 35 App. Div. 167). So if the attorney refuse to continue his services, without payment for services already rendered, the court will permit the client to substitute another attorney, and the first attorney has no lien which the court is required to protect,

before directing a substitution. (*Tuck v. Manning*, 53 Hun, 455; *Matter of H——, an Attorney*, 93 N. Y. 381). Where an attorney has agreed to wait for his compensation until a fund is recovered, and the client desires to change his attorney in the midst of the proceeding, the court will order the substitution and direct that the original attorney retain a lien on the fund, to be paid when the fund is recovered. (*Stewart v. Steck*, 6 N. Y. St. Rep. 524). The compensation of an attorney and counsellor, for his services, is governed by agreement, expressed or implied, which is not restrained by law. (Co. Civ. Proc. § 66). In estimating the value of the services, it was said by Mr. Lincoln, that there should be considered, the amount of labor; the doubtfulness and difficulty of the question; the degree of success in the result, and the amount of pecuniary interest involved, not merely in the particular case, but covered by the principles decided and thereby secured to the client. (10 Am. Law. Reg. New Ser. 553, note). It is said by the Court of Appeals that an attorney in the absence of an agreement is entitled to compensation according to the reasonable worth of his services, and in fixing that value, there must be considered, the nature of the services rendered; the standing of the attorney in his profession, for learning, skill and proficiency; the amount involved; the importance to his client of the result, and the result itself. (*Randall v. Packard*, 142 N. Y. 47, 56). An attorney may stipulate with his client for any rate of payment (*Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 443), or for a share in the proceeds of the suit, which share may be made contingent upon success (*Fowler v. Callan*, 102 N. Y. 395); but in case of a dispute between an attorney and client, the burden of proof is upon the attorney to show that the agreement was fair in all respects and was made by the client with the full knowledge of all the material circumstances, and the presumptions are always against the propriety of the transaction. (*Whitehead v. Kennedy*, 69 N. Y. 462, 466; *Haight v. Moore*, 37 Super. 161; *Hitchings v. Van Brunt*, 38 N. Y. 335, 342; *Petrie v. Williams*, 68 Hun, 589; *Matter of Cohen*, 84 Hun, 586; *Finlay v. Leary*, 87 Hun, 8). The court still retains the right to examine such contracts and set them aside in a proper case (*Haight v. Moore*, and other cases cited), and although an attorney may stipulate

that his compensation may be absolute, or contingent upon success, he cannot advance or agree to advance the money needed to carry on a suit as an inducement for placing a claim in his hands for prosecution (*Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 443), and any such agreement will be void and the attorney making it will be held responsible for the costs. (*Brotherson v. Consalus*, 26 How. Pr. 213). From the commencement of an action, or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof, in whosoever hands they may come; and the lien cannot be affected by any settlements between the parties, before or after judgment, or final order. The court, upon the petition of the client or attorney, may determine and enforce the lien. (Co. Civ. Proc. § 66). At common law, the attorney had a lien simply upon the judgment which he might have recovered in favor of his client, and the basis of his lien was the right of the attorney to resort to the fruits of judgment in compensation for his services, in obtaining it. (*Matter of Hoyt*, 12 Civ. Proc. Rep. 208; *Randall v. Van Wagenen*, 17 Civ. Proc. Rep. 403; S. C. 115 N. Y. 527). The lien existed for the costs or the agreed compensation, and to the extent of the lien the attorney was held to be an equitable assignee of the judgment. (*Marshall v. Meech*, 51 N. Y. 140). Since the enactment of section 66 of the Code above cited, the lien of the attorney has been extended to the cause of action. The section was amended by Chapter 61, of the Laws of 1899, so that it should apply to a special proceeding; this set aside the ruling of the courts, that the section did not cover special proceedings. See *Matter of Lexington Av.*, (30 App. Div. 602, *affd.* 157 N. Y. 678). The provision for the manner of determination and enforcement of the lien was also added by the same act. The section is now applicable to proceedings in the Surrogate's Court. (*Matter of Regan*, 167 N. Y. 338). The statutory lien exists from the beginning of an action, or the service of an answer containing a counterclaim. (*Quinlan v. Birge*, 43 Hun, 483; *Kaufman v. Keenan*, 18 N. Y. St. Rep. 933; *Chester v. Jumel*, 24 N. Y. St. Rep. 214). The attorney

for the defendant has no lien, unless the answer sets up a counterclaim (*Longyear v. Carter*, 88 Hun, 513); but the court will not allow, against the objection of defendant's attorney, a discontinuance without costs, after issue joined in an action in which no counterclaim is interposed, upon a stipulation of the defendant himself, where such stipulation was made without the knowledge or consent of the attorney, without paying, or providing for the payment of, costs, and for the purpose of depriving the attorney of any possible costs he might obtain. (*National Exhibition Co. v. Crane*, 167 N. Y. 505).

The lien given to the attorney for his services, by this statute, attaches, not only to the judgment, but to all securities for its payment or satisfaction, such as an undertaking on appeal (*Shackelton v. Hart*, 12 Abb. Pr. 235, note; 20 How. Pr. 39), and also to all provisional remedies granted in the action (*Crouch v. Hoyt*, 30 N. Y. Supp. 406), and these securities can no more be released or discharged to the prejudice of the attorney's lien than can the judgment itself. (*Ibid.*). Where an attorney has recovered judgments for clients, who subsequently make a general assignment for the benefit of their creditors, and those judgments are sold by the assignee for a sum smaller than the amount of the attorney's lien for costs, the amount thus realized is "the proceeds" of the judgment within the meaning of section 66. (*Matter of Gates, etc.*, 51 App. Div. 350). The lien extends to the agreed compensation, or if no agreement has been made, to the reasonable value of the services. (*Crotty v. McKenzie*, 42 Super, 192; *Fox v. Fox*, 24 How. Pr. 409, *Brown v. Mayor*, 9 Hun, 587; *Marshall v. Meech*, 51 N. Y.; 140); but it does not cover amounts due for services in other proceedings. (*Matter of Wilson*, 2 Civ. Proc. Rep. 343; *Williams v. Ingersoll*, 89 N. Y. 508, 517; *Brown v. Mayor*, 11 Hun, 21). An attorney has, it seems, a general lien for moneys due him for services, on property of a client in his hands. (*Matter of Lorillard*, 42 Hun, 545; *Matter of H—*, an Attorney, 87 N. Y. 521; *Schwartz v. Jenny*, 10 Wk. Dig. 67). It is not affected by the fact that the client is an executor or trustee, or that the services were rendered and the money received on behalf of an estate. (*Matter of Knapp*, 85 N. Y. 284). The lien is an equitable one, and is superior to that acquired by a subsequent

attachment or judgment against the client. To the extent of the lien the attorney is an equitable assignee of the cause of action. (*Harwood v. LaGrange*, 137 N. Y. 538). If the judgment was for costs only, no notice of the lien was required at common law. (*Marshall v. Meech*, 51 N. Y. 140). If the judgment was for damages and costs, or if the attorney claimed by way of compensation a greater sum than the taxable costs amounted to, it was doubtful whether notice of lien was required to prevent a settlement to the prejudice of the attorney. In the cases of *Jenkins v. Adams* (11 Weekly Dig. 630; 11 Hun, 600); *Tullis v. Runkle* (3 Law. Bul. 62), and *Marshall v. Meech* (*supra*), it was held that notice was required if the judgment was for damages and costs. But, as the lien given by section 66 is an absolute one (*Lansing v. Ensign*, 62 How. Pr. 363), and is created by statute in all cases, the better opinion would seem to be that no notice of it is required to be given to the opposite party, and so it has been held in the latest cases. (*Lewis v. Day*, 10 Wk. Dig. 49; *Quinlan v. Birge*, 43 Hun, 483; *Coster v. Greenpoint Ferry Co.*, 5 Civ. Proc. Rep. 146; *affd.* 98 N. Y. 660; *Peri v. N. Y. C. & H. R. R. Co.*, 152 N. Y. 521, 527; *Casucci v. A. & K. R. R. Co.*, 65 Hun, 45). But the existence of the lien does not prevent a settlement between the parties and a release of the judgment, which is made in good faith and without an intent to defraud the attorney, or which does not have the effect to defraud him. (*Lee v. Vacuum Oil Co.*, 126 N. Y. 579; *Poole v. Belcha*, 131 N. Y. 200; *Roberts v. Doty*, 31 Hun, 128; *Oliwell v. Verdenhalven*, 17 Civ. Proc. Rep. 362). A judgment will not be kept alive after the release between the parties, unless that course is necessary for the protection of the attorney. When such claim is made by the attorney, in order to warrant the court in disregarding the settlement and release, it must be shown that to give full effect to them, will operate as a fraud upon the attorney, or at least to his prejudice by depriving him of his costs, or turning him over to an irresponsible client. (*Poole v. Belcha*, 131 N. Y. 200; *Peri v. N. Y. C. & H. R. R. Co.*, 152

N. Y. 221; *Hart v. Mayor etc.*, 69 Hun, 237; *affd.* 139 N. Y. 610; *National Exhib. Co. v. Crane*, 167 N. Y. 505). When that has been made to appear, an order setting aside the satisfaction of the judgment, may be properly made. (*Bailey v. Murphy*, 136 N. Y. 50; *Com'l Telegram Co. v. Smith*, 57 Hun, 176). An attorney cannot bring an equitable action to enforce his inchoate right as an attorney where there has been a fraudulent settlement. (*Randall v. VanWagenen*, 115 N. Y. 527; *Fischer-Hansen v. Brooklyn Heights R. R. Co.*, 63 App. Div. 356). Nor can he proceed in the principal action itself after a settlement between the parties, without leave of the court (*Goodard v. Trenbath*, 24 Hun, 182; *Dimick v. Cooley*, 3 Civ. Proc. Rep. 141, 146; *Quinlan v. Birge*, 43 Hun, 483; *Randall v. VanWagenen*, 115 N. Y. 527, 532; *Leef v. Nassau Electric Co.*, 40 App. Div. 619), upon a motion made in the name of the attorney and for his benefit (*Murray v. Jibson*, 22 Hun, 386), and the court will set aside or modify such a settlement only so far as may be necessary to protect the rights of the attorney. (*Peri v. N. Y. C. & H. R. R. Co.*, 152 N. Y. 521). If the defendant, in making the settlement, acted in good faith, the attorney will be required before setting it aside to endeavor to obtain payment from his client, unless some reason is shown why that cannot be done. (*Quinlan v. Birge*, *supra*). If leave to proceed in the action is granted, it is the duty of the court to direct as to the time and manner of the further prosecution of the action, and to watch the proceedings and doings of the attorney, so as to fully protect the rights of both parties, and not unnecessarily to annoy or embarrass the defendant, when he has acted in good faith (*Quinlan v. Birge*, *supra*), and the settlement is not an admission of liability. (*Cosucci v. A. & K. R. R. Co.*, 65 Hun, 452). Where there has been a settlement of a negligence case, by a payment to the plaintiff himself, without the knowledge of the attorney for the plaintiff, who was to receive one-third of the recovery, the attorney cannot recover of the defendant one-third of the amount paid but must prove the plaintiff's case. (*Ibid.*) If the parties have agreed upon a settlement and notice of the lien is given,

before it is carried into effect, the party paying will be liable for the money in his hands, at the time of the receipt of the notice. (*Tullis v. Runkle*, 3 Law. Bul. 62). The defendant should notify the plaintiff's attorney of the intended settlement with the plaintiff, or protect the rights of the attorney, or take the consequences of the settlement without his knowledge. (*Eberhart v. Shuster*, 10 Abb. New Cas. 374). In case there is a settlement and an agreement by the defendant to pay the plaintiff's attorneys the one-third they were to have by contract with the plaintiff, the court cannot enforce that agreement of the defendant by summary order. The court, in such cases, will order that unless the defendant carries out his agreement, the plaintiff's attorneys shall have leave to continue the action for the enforcement of their lien. (*Harris v. Elliott*, 19 App. Div. 60; *Pilkington v. Brooklyn Heights R. R. Co.*, 48 App. Div. 22). The addition to section 66 of the Code of Civil Procedure made by chapter 61 of the Laws of 1899, of the provision that "the court, upon the petition of the client or attorney, may determine and enforce the lien," does not empower the court to direct a defendant, who has settled a case without the knowledge of the plaintiff's attorney, to pay an amount fixed in such summary proceeding, to the plaintiff's attorney in satisfaction of his lien. That amendment is confined to the adjustment of differences between attorney and client. The defendant is entitled to have his day in court, so the attorney must be given leave to prosecute the action to enforce his lien, in case the defendant should not pay a certain amount within a fixed time. (*Rochfort v. Met. St. Ry.*, 50 App. Div. 261). Even the consent of the client and attorney does not give the court jurisdiction to adjust, by summary proceedings, differences arising out of any but professional relations. (*Matter of Langslow*, 167 N. Y. 314). The attorney's lien being regarded as an equitable assignment of the judgment for costs, such a judgment in favor of one will not be set off against a judgment recovered against him, by the other party, to the prejudice of the attorney. (*Ennis v. Currey*, 22 Hun, 584; *Naylor v. Lane*, 50 Super, 97;

Moloughney v. Kavanagh, 3 Civ. Proc. Rep. 253). The attorney may enforce his lien by supplementary proceedings on the judgment (*Russell v. Summerville*, 10 Abb. N. C. 395, note), or he may, without the consent of his client, sue in the client's name on an undertaking given on the appeal. (*Shackelton v. Hart*, 20 How. Pr. 39). Where the judgment has been paid after execution returned unsatisfied, the attorney can not enforce his lien by supplementary proceedings, until the satisfaction has been vacated. (*Ackerman v. Ackerman*, 14 Abb. Pr. 229; *McKenzie v. Rhodes*, 13 Abb. Pr. 337). If the amount of the compensation to be paid to the attorney is in dispute, it can not be determined by the court upon the motion made against the judgment debtor to set aside the release, but the amount must be liquidated in some proper proceeding against the client, who has the right to be heard, and to have the amount established against him by competent evidence. (*Bailey v. Murphy*, 136 N. Y. 50; *Harwood v. LaGrange*, 137 N. Y. 538). The amount of the lien can be established in summary proceedings under section 66 (as amended in 1899), instituted by the attorney against the client, and in such a proceeding the court has power, either with or without a reference, to fix the amount of the lien. (*Matter of King*, 168 N. Y. 53). Counsel employed to try a cause simply, has no lien under this section. (*Phillips v. Stagg*, 2 Edw. Ch. 108; *Brown v. Mayor*, 9 Hun, 587). An attorney has not a lien on alimony. (*Weill v. Weill*, 3 Civ. Proc. Rep. 241; *Branth v. Branth*, 32 N. Y. St. Rep. 979). An attorney suing for the plaintiff *in forma pauperis* can have no lien upon the costs. (*Quinnan v. Clapp*, 10 Abb. N. C. 394). The attorney may, of course, waive his lien. (*Goodrich v. McDonald*, 112 N. Y. 157). But whenever costs are awarded in favor of one suing or defending as a poor person, they must be paid over to the attorney when collected, and distributed among the attorney and counsel assigned to the poor person, as the court directs. (Co. Civ. Proc. § 467). If an attorney subscribes a pleading containing scandalous matter which is stricken out on the motion of the aggrieved party, the costs of the motion may be directed to be

paid by the attorney. (Co. Civ. Proc. § 545). His failure to pay such costs may be punished as a contempt. (Ibid.). An attorney or counselor-at-law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment. (Co. Civ. Proc. § 835). The privilege is that of the client, (*Hoyt v. Jackson*, 3 Den. 388); when the client is dead, therefore, the attorney's mouth is closed. (*Butler v. Fayerweather*, 91 Fed. Rep. 458). While the contract relation of attorney and client must exist (*Renihan v. Dennin*, 103 N. Y. 573, 579), the communication is privileged, although no compensation is to be paid for the attorney's services. (*March v. Ludlum*, 3 Sand. Ch. 38). Counsel, as well as attorneys, are included within the prohibition. (*Loveridge v. Hill*, 96 N. Y. 222). The lawyer must be acting as the attorney, not as a notary, (*Mut. Life Ins. Co. v. Carey*, 54 Hun, 493; *Shufelt v. Watrous*, 16 Wk. Dig. 198); nor as a mutual friend (*Haulenbeck v. McGibbon*, 60 Hun, 26); nor as a general agent (*Bank v. Suydam*, 5 How. Pr. 254). When the attorney is a subscribing witness to a will, he may testify as to its preparation and execution. (Co. Civ. Proc. § 836). Where an attorney, who drew a will, is employed to contest it, there is no privilege. (*Sheridan v. Houghton*, 16 Hun, 628; *affd.* on another point, 84 N. Y. 643). Communications made by a client to an attorney to enable him to draw a complaint are privileged (*Armstrong v. People*, 10 N. Y. 38); or to the clerk of the attorney (*Sibley v. Waffle*, 16 N. Y. 180). Instructions given by a client to his attorney for the preparation of bankruptcy papers are privileged. (*Lockwood v. House*, 49 N. Y. Super. 500; *affd.* 101 N. Y. 647). A communication to an attorney, in reference to his client's personal estate, made upon retaining him to draw an affidavit for the purpose of procuring a reduction of an assessment on such estate is privileged. (*Williams v. Fitch*, 18 N. Y. 546). Instructions of the client to the attorney for the draft of a will are privileged (*Matter of Coleman*, 111 N. Y. 220; *Loder v. Whelpley*, 111 N. Y. 239; *In re O'Neil*, 26 N. Y.

St. Rep. 242) ; so also conversations relating to a codicil not executed (*Pearsall v. Elmer*, 5 Redf. 181), or executed and destroyed. (*Butler v. Fayerweather*, 91 Fed. Rep. 458). Communications to an attorney by his client with reference to the draft of a deed are privileged. (*Barry v. Coville*, 53 Hun, 620; affd. 129 N. Y. 302). If the communications and directions for drawing the deed are from both parties there is no privilege. (*Hebard v. Haughian*, 70 N. Y. 54). Belief in an attorney's mind, formed from information obtained from his client is inadmissible. (*Eastman v. Kelly*, 16 N. Y. St. Rep, 894). Advice of the corporation counsel to a board of assessors is privileged. (*Peo. ex rel Updyke v. Gillon*, 18 Civ. Proc. Rep. 109). Communications by the client to his attorney as to the disposition of property, even if such disposition is in defraud of creditors, are privileged. (*The Bank of Utica v. Mersereau*, 3 Barb. Chanc. 528, 593-600). The privilege is not confined to cases where the client is a party, but extends to all persons between whom the relation exists (*Goddard v. France & Bates*, 19 Law. Rep. 218) ; though the statements do not relate to any litigation, commenced or anticipated. (*Yates v. Olmsted*, 56 N. Y. 632). A simple consultation between lawyer and client although no fee is paid, or no suit was pending, is privileged (*Bacon v. Frisbie*, 80 N. Y. 394), and even though the lawyer disclaims that he was acting in a professional capacity. (*Id.*). Where an attorney has acquired knowledge of a *malum in se* through professional relations with his client, such communications are not privileged. (*Bk. of Utica v. Mersereau*, 3 Barb. Chanc. 528, 598-600, *semble*; *Peo. v. Blakeley*, 4 Parker's Cr. C. 176). A direction given by a client to his attorney, to employ an accountant is not privileged. (*Martin v. Platt*, 51 Hun, 429). An attorney may testify to the place where a deed, prepared by him for his client, was executed by the client (*Mutual L. I. Co. v. Corey*, 54 Hun, 493; reversed on another point in 135 N. Y. 326) ; or to the delivery of the deed (*Rosenburg v. Rosenburg*, 40 Hun, 91) ; or, generally, as to the facts of delivery and execution. (*Shattman v. American Credit Indemnity Co.*,

34 App. Div. 392). An attorney may testify as to the handwriting of a former client. (*Holthausen v. Pondir*, 55 N. Y. Super. Rep. 73; *affd.* without opinion, 120 N. Y. 622). He may also testify as to the fact of his employment. (*Hampton v. Boylan*, 46 Hun, 151). When the communication is made in the presence of another person or where two or more persons consult an attorney for their mutual benefit, there is no privilege. (*Corency v. Tannahill*, 1 Hill, 33; *Whiting v. Barney*, 30 N. Y. 330; *Hurlburt v. Hurlburt*, 128 N. Y. 420; *Peo. v. Buchanan*, 145 N. Y. 1; *Doheny v. Lacy*, 42 App. Div. 218). Where, however, parties having diverse or hostile interests, or claims, submit the matter to a common attorney for his advice, the communication is privileged. (*Root v. Wright*, 84 N. Y. 72). An attorney must testify concerning a contract made with his client, when asked concerning it. (*Foster v. Wilkinson*, 37 Hun, 242). In case the client refers a person to the attorney, for the purpose of having him make a statement of the client's position with reference to a certain matter communicated by the client to the attorney, there is no privilege (*Galle v. Tode*, 74 Hun, 542; *affd.* on other points, 148 N. Y. 270); or where the statement is made by the client with an intent that it should be imparted to another. (*Collins v. Robinson*, 72 Hun, 495). Communications made after the cessation of the relation of attorney and client are not privileged. (*Peo. v. Hess*, 8 App. Div. 143).

ARTICLE II.

THE JURISDICTION OF THE COURTS.

SECTION.

1. Their Jurisdiction generally.
2. The Court of Appeals.
3. The Supreme Court.
4. Courts which have been abolished.
5. The City Court of the City of New York.
6. The County Courts.
7. Power of Judges out of Court.

Sec. 1. Their Jurisdiction Generally.

Speaking generally, it may be said that the courts of the state have jurisdiction to redress every wrong suffered by any citizen, and to enforce every right belonging to him, either existing at common law, or arising by statute (*Delafield v. Illinois*, 2 Hill, 159; 26 Wend. 192; *Teall v. Felton*, 1 N. Y. 537; *Cook v. Whipple*, 55 N. Y. 150), whether of this state, or of the United States (*Robinson v. National Bank of Newberne*, 81 N. Y. 335, 391; *Clafin v. Houseman*, 93 U. S. 136), or of any other state. (*Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48). But this general jurisdiction cannot be exercised over persons or property not within the territorial limits of the state, and it is restricted in some respects, by the constitution and laws of the United States. There are two classes of cases, arising under the constitution and laws of the United States, in which the jurisdiction of the courts of the United States may justly be regarded as exclusive; the first being, where the jurisdiction is made exclusive, by the express terms, or by the necessary construction, of the provisions of the United States constitution; the second, where an act of congress confers a jurisdiction that, before its passage, could not have been exercised at all, that is, when the act not merely confers, but creates the jurisdiction. (*Woolsey v. Judd*, 4 Duer, 379, 382; *Kidder v. Horrobin*, 72 N. Y. 159, 165). But the jurisdiction granted by the national constitution, is not exclusive, unless it is made so in terms, or prohibited to the states or incompatible with the exercise of concurrent jurisdiction. (*People v. Welch*, 141

N. Y. 266). The intention to deprive the courts of the state of jurisdiction, is never presumed, nor will the words of any statute be extended beyond the strict meaning, to accomplish that result. To do that, the intention of congress must be distinctly manifested, and the legislation relied upon must be clear and unambiguous. No presumption that the jurisdiction of the state courts is excluded, arises from the mere fact that congress has legislated; there must be express words of exclusion, or a manifest repugnancy in the exercise of the state authority over the subject. (*People v. Welch*, 141 N. Y. 266; *Kidder v. Horrobin*, 72 N. Y. 159). The courts of the state have jurisdiction of an action brought by the United States (*United States v. Dodge*, 14 Johns. 95; *United States v. Graff*, 4 Hun, 634), or in an action against them, where they appear. (*Johnston v. Stimmel*, 89 N. Y. 117). A foreign government may sue in the courts of the state. (*Republic of Mexico v. De Arrangois*, 5 Duer, 634; *Same v. Ockenshausen*, 37 Hun, 533). So may another state. (*Michigan v. Phoenix Bank*, 33 N. Y. 9; *Delafield v. Illinois*, 2 Hill, 159). The courts of the state have jurisdiction of all actions, legal or equitable, brought by the assignee in bankruptcy to recover the estate of the bankrupt, or to determine the rights of property, claimed by him as such assignee, or in any way affecting the same. (*Cook v. Whipple*, 55 N. Y. 150; *Kidder v. Horrobin*, 72 N. Y. 159; *Olcott v. McLean*, 73 N. Y. 223; *Ansley v. Patterson*, 77 N. Y. 156; *Platt v. Jones*, 96 N. Y. 24). They also have jurisdiction in actions by and against national banks (*Cook v. State National Bank*, 52 N. Y. 96; *Brinckerhoff v. Bostwick*, 88 N. Y. 52), although they may be located in another state. (*Robinson v. The National Bank of Newberne*, 81 N. Y. 385). They also have jurisdiction of an action brought by the receiver of a national bank of another state, to recover the amount of an assessment upon the stockholders. (*Peters v. Foster*, 56 Hun, 607). The courts of this state have jurisdiction in actions for tort or on contract, although they arose outside of the state. (*Home Ins. Co. v. Penn. R. R. Co.*, 11 Hun, 182; *Lister v. Wright*, 2 Hill, 320; *Burdick v. Freeman*, 120 N. Y. 420). They have

this jurisdiction, although both parties resided in another state, when the wrong was committed and when the action was commenced. (*Burdick v. Freeman, supra*). But unless special reasons are shown, the courts will not retain jurisdiction of such an action of tort. (*Ferguson v. Neilson*, 33 St. Rep. 814; 11 Supp. 525). The recent case of *Wertheim v. Clergue* (53 App. Div. 122) has made a distinction between actions founded on different torts. In actions based on purely personal wrongs jurisdiction will not be retained, while in causes founded on a tort arising out of commercial transactions the courts will not be closed to non-residents. The particular tort in the *Wertheim* case was deceit. The refusal of a court, in such cases, to entertain jurisdiction between non-residents for a tort, committed out of the state, does not depend upon the motion of the parties, but it is entirely in the discretion of the court, whether it will retain jurisdiction of a cause already begun. (*Winchester v. Browne*, 37 St. Rep. 542; 13 Supp. 655; *Burdick v. Freeman, supra*). The courts of this state will not refuse, however, to entertain jurisdiction of a cause of action arising out of contract. (*Smith v. Crocker*, 14 App. Div. 245; *affd. without op.*, 162 N. Y. 600; *Furbush v. Nye*, 17 App. Div. 325; *Belden v. Wilkinson*, 44 App. Div. 420). An action for specific performance of a contract, made in this state, to convey lands in another state, or in a foreign country, may be maintained in the courts of this state. (*Ward v. Arredondo*, Hopk. Chan., 213; *Gardner v. Ogden*, 22 N. Y. 327).

But the courts of this state have no jurisdiction of actions against the United States (*U. S. v Lee*, 106 U. S. 196, 207), nor against the state, unless by express statute (*People v. Dennison*, 84 N. Y. 272), nor against the sovereign of a foreign state (*Hatch v. Baez*, 7 Hun, 596; *Duke of Brunswick v. The King of Hanover*, 2 House of Lords Cases, 1), nor against the ministers or consuls of a foreign state. (U. S. R. S. § 687; *Valerino v. Thompson*, 7 N. Y. 676; *Rock Riv. Bank v. Hoffman*, 14 Abb. Pr. 72). An action can not be maintained in the courts of the state, to restrain the infringement of a patent

(*Dudley v. Mayhew*, 3 N. Y. 9; *Denise v. Swett*, 142 N. Y. 602), nor to restrain the infringement of a trade mark upon a patented article. (*Wilcor & Gibbs Sewing Mach. Co., v. Kruse & Murphy Mfg. Co.*, 3 St. Rep. 590). But the jurisdiction of the state courts in actions on contract, is not limited because of the fact that the subject of the jurisdiction is a patented article. The interpretation of the contract, the effect to be given to its various parts, and even the right to the patent, may be the subject of consideration, within the courts of the state, while any interference beyond this is in contravention of the general rule, that in such an action the jurisdiction rests exclusively within the courts of the United States. (*Continental Store Service Co., v. Clark*, 100 N. Y. 365). Within the rule laid down in this case, it has been held that an action may be maintained in the courts of this state to recover royalties which one has agreed to pay to the patentee of an article (*Hyatt v. Ingalls*, 124 N. Y. 93), or to compel the assignment of a patent taken out by an employe in his own name, in violation of the terms of his employment, according to which the invention was to be the property of the employer. (*Annin v. Wren*, 44 Hun, 352). So the courts of this state may decide questions as to the title to letters patent, granted by the United States, where no question is made as to the validity of the patent. (*Continental Store Service Co., v. Clark, supra*). No action can be maintained in this state to recover lands out of this state, nor for any waste or trespass upon such lands. (*Watts v. Kinney*, 23 Wend. 484; *Am. Un. Tel. Co., v. Middleton*, 80 N. Y. 408; *Cragin v. Lovell*, 88 N. Y. 258; *Dodge v. Colby*, 108 N. Y. 445). But where the parties have agreed that an action for partition of lands, situate in another state, may be brought in this state, and that they will consent to the jurisdiction, and will execute deeds in accordance with the judgment, such an action may be maintained. (*Bowers v. Durant*, 43 Hun, 348; 104 N. Y. 661). So, although the state has ceded political jurisdiction to the United States, of lands within the boundaries of this state, the state courts still retain jurisdiction over such lands, and of wrongs committed upon them. (*Barrett*

v. *Palmer*, 135 N. Y. 336). The courts of New York state have no jurisdiction or control of the business of a foreign corporation, nor can they interfere with its franchise. (*Chase v. Vanderbilt*, 37 Super. 334; *Merrick v. Van Santvoord*, 34 N. Y. 208). The supreme court, being a court of general jurisdiction, could independently of any statute, entertain actions against foreign corporations, although brought by a non-resident, for a cause of action which arose without the state, if the defendant appeared generally in the action, and submitted itself to the jurisdiction of the court. (*McCormick v. Penn. R. R. Co.*, 49 N. Y. 303). But since the enactment of section 1780, of the Code of Civil Procedure, the courts of this state have jurisdiction of an action by a non-resident plaintiff, against a foreign corporation, only in the cases therein specified, and not at all for a cause of action which arose outside of the state. (*Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315). A resident of the state, however, or a domestic corporation, can maintain an action in the courts of this state, against a foreign corporation, for any cause of action (*Id.*), and a foreign corporation may maintain any action against a non-resident within the courts of this state, which any other person may maintain. (*Colorado St. Bk. v. Gallagher*, 76 Hun, 310). An action cannot be maintained in them, to enforce the penal laws of another state (*Scoville v. Canfield*, 14 Johns. 338; *Bird v. Hayden*, 2 Abb. N. S. 61; *Winter v. Baker*, 50 Barb. 432), nor of the United States. (*U. S. v. Lathrop*, 17 Johns. 4). It is doubtful whether they have authority to release, upon *habeas corpus*, a soldier enlisted in the United States army; but the better opinion is, that such jurisdiction is concurrent with the courts of the United States, unless congress has prohibited the state courts from exercising it. (*Matter of Barrett*, 42 Barb. 479; *Matter of Hopson*, 40 Barb. 34; *Matter of O'Connor*, 48 Barb. 258; 1 Kent's Com. 400-401). The courts of this state have no jurisdiction against a non-resident on a money demand, unless upon personal service within the state, or voluntary appearance, but a judgment is valid against property attached within the state, in an action against a non-resi-

dent, and substituted service, pursuant to the laws of the state, is sufficient to sustain such a judgment. (*Pennoyer v. Neff*, 95 U. S. 714; *Bartlett v. Spicer*, 75 N. Y. 528). It has been held that ejectment cannot be maintained against a person claiming to hold land by authority of the United States, as an officer or agent of the general government (*People v. Ambrecht*, 11 Abb. Pr. 97), but this holding is adverse to the case of the *United States v. Lee* (106 U. S. 196), which holds that a person, claiming to be the owner of land, may maintain an action in any court of competent jurisdiction, against a person in possession as an officer or agent of the United States, and the lawfulness of that possession, and the right or title of the United States, may be the subject matter of inquiry, and may be adjudged. This jurisdiction, vested in the courts of the state, is, however, divided among the several courts, and each court exercises the jurisdiction and power, which may be vested in it by law, according to its course and practice. (Co. Civ. Proc. § 4).

Sec. 2. Court of Appeals.

The court of appeals is established by the constitution, article 6, section 7, and is composed of a chief judge and six associate judges, five of whom are a quorum, and the concurrence of four is necessary to a decision. Whenever, and as often as, a majority of the judges of the court shall certify to the governor that the court is unable to hear and dispose of causes pending there with reasonable speed, on account of accumulation, the governor shall designate not more than four justices of the supreme court to serve as associate judges. Those justices are relieved of their duties as supreme court justices and sit as associate judges until the number of causes undisposed of on the court of appeals calendar is reduced to two hundred. No more than seven judges shall sit in any case. It has no original, but only appellate jurisdiction. Before the amendments to the constitution of 1894, the jurisdiction of the court of appeals was established solely by acts of the legislature. As fixed by those acts, appeals lay to that court, not only from final judgments in actions, and final orders in supplementary proceedings, but from a large number of orders made during the

progress of an action, or a special proceeding, and also from interlocutory judgments. It was enacted also by the legislature that no appeal could be taken to the court of appeals, if the matter in controversy, excluding costs, was less than five hundred dollars, except in an action or special proceeding affecting the title to real property; unless the court below, by order, permitted such an appeal to be taken. The amendment of 1894, however, provided that, except where the judgment was of death, the jurisdiction of the court of appeals shall be limited to the review of questions of law (Constitution, Art. 6, § 9). It also provided further that no unanimous decision of the appellate division that there is evidence supporting or tending to sustain a finding of fact, or a verdict not directed by the court, shall be reviewed by the court of appeals. The right of appeal was further defined. The amendment provided that, except where the judgment is of death, appeals may be taken, as of right, to said court only from judgments or orders entered upon decisions of the appellate division, finally determining actions or special proceedings and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them. The appellate division is given the power to allow appeals upon questions of law. After defining the jurisdiction of the court of appeals in this general way, the legislature is given the power to further restrict that jurisdiction and the right of appeal to that court; the right of appeal, however, shall not depend upon the amount involved. (Const. Art. 6, § 9). In accordance with the provisions of that constitution, the legislature has enacted that from and after the last day of December, eighteen hundred and ninety-five, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determination made by the appellate division of the supreme court in either of the following cases, and no others:

1. Appeals may be taken as of right to said court, from judgments or orders finally determining actions or special proceedings, and from orders granting new trials

on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them.

2. Appeals may also be taken from determinations of the appellate division of the supreme court in any department where the appellate division allows the same, and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the court of appeals shall certify to the appellate division its determination upon such questions. (Co. Civ. Proc. § 190). The jurisdiction conferred by the last section, is subject to the following limitations, exceptions and conditions:

1. No appeal shall be taken to said court, in any civil action or proceeding commenced in any court other than the supreme court, court of claims, county court or a surrogate's court, unless the appellate division of the supreme court allows the appeal by an order made at the term which rendered the determination, or at the next term after judgment is entered thereupon, and shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

2. No appeal shall be taken to said court from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury, or to recover damages for injuries resulting in death, or in an action to set aside a judgment, sale, transfer, conveyance, assignment or written instrument, as in fraud of the rights of creditors, or in an action to recover wages, salary, or compensation for services, including expenses incidental thereto, or damages for breach of any contract therefor, or in an action upon an individual bond or individual undertaking upon appeal, when the decision of the appellate division of the supreme court is unanimous, unless such appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or unless in case of its refusal to so certify, an appeal is allowed by a judge of the court of appeals.

3. The jurisdiction of the court is limited to the review of questions of law.

4. No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals. (Co. Civ. Proc. § 191).

The subject of the jurisdiction of the court of appeals is more fully dealt with in the second volume of this work.

Sec. 3. The Supreme Court.

This court was created by an act of the colonial assembly passed in 1691, which continued for but two years. In 1692, it was extended for one year longer, and by successive re-enactments of one or two years each, until 1698. After that time, owing to a disagreement between the colonial assembly and the governor, an act passed for its continuance failed to become a law, and on the 15th of May, 1699, the then governor published an ordinance, re-establishing all the courts as they had existed under the mandatory act of 1692. There was no subsequent act of the colonial assembly, establishing this court, but it was recognized as existing by the first constitution of the state, which was adopted on the 20th of April, 1777. The present supreme court was established by the constitution of 1846, and its organization was largely changed by the amendments which were adopted by the vote of the people in 1894, and which took effect as to the supreme court, on the 1st of January, 1896. By that constitution, the state is divided into eight judicial districts and the court consists of seventy-six justices, a certain number of whom are elected in each district. Among these seventy-six justices are those who were formerly judges of the superior court of the city of New York; the court of common pleas for the city and county of New York; the superior court of Buffalo, and the city court of Brooklyn. These justices are justices of the supreme court for the remainder of the terms for which they were elected, but they have authority to sit as such only in the counties in which they were elected. Their

successors, however, are to be elected as justices of the supreme court, by the electors of the judicial district in which they reside. (Const. Art. 6, § 1). By an amendment to article 6 of the constitution (§ 24), adopted in 1900, this number of justices was increased by seven—four in the first judicial district, and three in the second. The state is divided into four judicial departments, in each of which there is an appellate division of the supreme court. The judges of the appellate division are selected by the governor, from the justices elected to the supreme court. In the first department, which is composed of the county of New York, the appellate division consists of a presiding justice and six associate justices. In each of the other departments the appellate division consists of a presiding justice and four associate justices. Four judges constitute a quorum, and the concurrence of three shall be necessary to a decision. No more than five justices can sit in any department in any case. (Const. Art. 6, § 2). The presiding justice and a majority of the justices designated to sit in the appellate division in each department shall be residents of the department. (Const. Art. 6, § 2). Whenever the appellate division in any department shall be unable to dispose of its business within a reasonable time, a majority of the presiding justices, at a meeting called by the presiding justice of the department in arrears, may transfer any pending appeals from such department to any other department for hearing and determination. (Ibid.). This power has been exercised several times by the transfer of causes from the first to the second department. No justice of the appellate division shall exercise any of the powers of a justice of the supreme court other than those of a justice out of court, and those pertaining to the appellate division, or to the hearing and decision of motions submitted by consent of counsel. Under this inhibition an appellate division justice cannot receive a verdict of a jury at a trial term of the supreme court, even though counsel consent to such a course. (*French v. Merrill*, 27 App. Div. 612; appeal dismissed, 157 N. Y. 704). Any other justice of the supreme court has power to hold a trial term or special term of the supreme court,

for the whole or any portion of the term, and to act upon any business which regularly comes before the term in which he is sitting, except where he is personally disqualified from sitting in a particular action or special proceeding. (Co. Civ. Proc. § 235). A justice of the supreme court not assigned to the appellate division has jurisdiction to hold a trial or special term in a department other than that in which he was elected. (*People v. Herrman*, 149 N. Y. 190; *People v. Pustolka*, 149 N. Y. 570). The court whether sitting in the appellate division or at the trial or special term, is one court and the clerks and officers of record all belong to the same court (*Salmon v. Gedney*, 75 N. Y. 479), and the jurisdiction of the court may be exercised, either at a term of the appellate division, or at a trial or special term, unless there is some statute expressly restricting the manner of its exercise. The appellate divisions are not courts of record distinct from the supreme court, but are a continuance of the former general terms, exercising the same appellate jurisdiction. (*Matter of Pye*, 21 App. Div. 266). The court at a term held by one judge, may hear all questions that may come before the appellate division, except upon appeal (*People v. Nichols*, 79 N. Y. 582; *Matter of Canal and Walker Street*, 12 N. Y. 406), and the appellate division, except as limited by statute, has all the power and jurisdiction of the court. (*Syracuse Sav. Bk. v. S. C. & N. Y. R. R. Co.*, 88 N. Y. 110). A justice holding court in any part of the state may make an order of the supreme court in any action, no matter where the venue is laid, unless the order is one required to be made upon notice, except in certain cases, regulated by special statutes. (*People ex rel. Post v. Grant*, 50 Hun, 243). The appellate division of the supreme court has not only the jurisdiction which was exercised by the former general terms of that court, but in addition, the jurisdiction which belonged to the superior city courts, so called. (Const., Art. 6, § 2; Co. Civ. Proc. § 220). The constitution provides that the supreme court shall have general jurisdiction in law and equity, subject to such appellate jurisdiction of the court of appeals, as now is or may be prescribed by law. (Art. 6,

§ 1). This jurisdiction, given by the constitution, cannot be limited by the legislature (*People v. Nichols*, 79 N. Y. 582; *Hart v. Hart*, 3 Hun, 375), and the court, or the justices of the court are bound to exercise it, when called upon in proper form. (*Alexander v. Bennett*, 60 N. Y. 204). The statute provides that the general jurisdiction in law and equity, which the supreme court of the state possesses, under the provisions of the constitution, includes all the jurisdiction which was possessed and exercised by the supreme court of the colony of New York, at any time, and by the court of chancery in England, on the 4th day of July, 1776, with the exceptions, conditions and limitations, created and imposed by the constitution, and laws of the state; subject to those exceptions and limitations, the supreme court of the state has all the powers and authority of each of those courts, and exercises the same in like manner. (Co. Civ. Proc. § 217). The jurisdiction of the supreme court of the colony, as defined by the act of the colonial assembly, and by various ordinances of the governor and council, extended to all pleas and causes, civil, criminal and mixed, with the like power as the court of king's bench, and common pleas, and exchequer of England. (2 Revised Laws, 1813, appendix 5 and 6; Graham's Pr. 1; *Kanouse v. Martin*, 3 Sanf. S. C. 653). All this jurisdiction, as it existed in 1846, is vested in the present supreme court. It also has succeeded to all of the jurisdiction of the court of chancery, as it existed in 1846. (*Sherman v. Felt*, 2 N. Y. 186). The equity jurisdiction thus vested in it, includes all cases, which may be properly comprehended within established and existing equitable principles. (*Youngs v. Carter*, 10 Hun, 194). The rule of the court of chancery, by which that court refused to take jurisdiction where the amount involved was less than a hundred dollars, no longer exists. (*Marsh v. Benson*, 34 N. Y. 358). The court has general supervision over inferior tribunals, and persons acting judicially (*LeRoy v. The Mayor*, 20 Johns. 429; *People v. Nichols*, 79 N. Y. 582, 589); over trusts and trustees (*People v. Norton*, 9 N. Y. 176; 2 Rev. Stat. 9 Ed. 1802); of the person and estates of lunatics, infants and habit-

ual drunkards (Co. Civ. Proc. §§ 2320, 2345, 2348; *Wilcox v. Wilcox*, 14 N. Y. 575; *Matter of Hubbard*, 82 N. Y. 90); to permit the sale, mortgage or leasing for more than three years of the real estate of any membership corporation (Membership Corporation Law, § 13); or of any religious corporation (*Madison Av. Bap. Ch. v. Bap. Ch. in Oliver St.*, 46 N. Y. 131, 137; Religious Corporation Law, § 11); over corporations, and their directors, managers or trustees (Co. Civ. Proc. § 1781, 1785, 1798); upon petition for the voluntary dissolution of corporations (Co. Civ. Proc. § 2419); to enforce the remedies of stockholders of banking corporations (Banking Law, §§ 33, 36); and to review proceedings had at the election of officers of corporations (Gen. Corporation Law, § 27); to correct errors in the determinations of county canvassers (Election Law, § 133); to review illegal, or erroneous, or unequal assessments (Laws of 1880, Chap. 269); of claims against the estates of deceased persons (Co. Civ. Proc., § 2718); of all proceedings for the collection of demands against ships or vessels (3 R. S. 9th Ed., 2196 *et seq*); to enforce penalties and forfeitures to the people of the state (Co. Civ. Proc. § 1962); of all proceedings under the general assignment act (Laws of 1885, Chap. 380); of the following writs: habeas corpus to bring up persons to testify or answer; habeas corpus or certiorari to inquire into the cause of detention; mandamus; prohibition; the writ of assessment of damages; and the writ of certiorari; which are now called state writs. (Co. Civ. Proc. §§ 1991, 2017, 2067, 2091, 2103, 2104, 2120). The supreme court also has power to make an order directing that an issue of fact, in an action pending in any other court of record except the city court of the city of New York, or a county court, be tried at a term of the supreme court in another county. (Co. Civ. Proc. § 218). It also has power to remove to itself an action brought and pending in the city court of the city of New York, or in any county court, for the purpose of changing the place of trial thereof. (Co. Civ. Proc. §§ 319, 342, 343). The court is always open for the transaction of such equity business as might be done by the chancellor out of term.

(*Wilcox v. Wilcox*, 14 N. Y. 575; *Matter of Bookhout*, 21 Barb. 348).

Sec. 4. Courts Which Have Been Abolished.

By section 12 of article 6 of the constitution adopted in 1869, there were recognized as existing, the superior court of the city of New York, the court of common pleas of the city and county of New York, the superior court of Buffalo, and the city court of Brooklyn, and those courts, speaking generally, had, within the limits of their respective cities and counties, the same general jurisdiction as was possessed by the supreme court. In addition to that, the court of common pleas of the city of New York, had extensive jurisdiction of a peculiar kind, based upon the fact that it was substantially the county court of the county of New York. This court was the oldest court in the state, having been the first court organized by the Dutch, after the settlement of the province of New Amsterdam. By the provisions of the constitution which took effect on the first day of January, 1895, these courts were abolished, from and after the first day of January, 1896, and all the jurisdiction exercised by them was vested in the supreme court.

Besides these courts, the constitution abolished the circuit courts, which had been created in 1786, and which had existed uninterruptedly from that time. The business which had been done in the circuit court was, after the first day of January, 1896, to be transacted at the trial term of the supreme court. The same provisions of the constitution also abolished the courts of oyer and terminer, and the courts of sessions, which were practically the criminal parts of the circuit courts, and the county courts, respectively. The jurisdiction of the oyer and terminer was vested in the supreme court, and that of the court of sessions, in the county court. (Const. Art. 6, §§ 6, 14).

Sec. 5. The City Court of the City of New York.

This court consists of six judges, one of whom is the chief judge of the court. It was formerly known as the marine court of the city of New York, but its name was

changed to the city court of the city of New York, by chapter 36 of the laws of 1883. It has jurisdiction in :

1. An action against a natural person, or against a foreign or domestic corporation, wherein the complaint demands judgment for a sum of money only, or to recover one or more chattels with or without damages for the taking or the detention thereof.

2. An action to foreclose or enforce a lien upon real property in the city of New York, created as prescribed by statute, in favor of a person who has performed labor upon or furnished materials to be used in the construction, alteration or repair of a building, vault, wharf, fence or other structure; or who has graded, filled in or otherwise improved, a lot of land, or the sidewalk or street in front of or adjoining a lot of land.

3. An action to foreclose or enclose a lien, for a sum not exceeding two thousand dollars, exclusive of interest, upon one or more chattels.

4. The taking and entry of a judgment, upon the confession of one or more defendants, where the sum, for which judgment is confessed, does not exceed two thousand dollars, exclusive of interest from the time of making the statement upon which the judgment is entered. (Co. Civ. Proc. § 315).

But that jurisdiction is subject to the following limitations:

1. In an action wherein the complaint demands judgment for a sum of money only, the sum, for which judgment is rendered in favor of the plaintiff, cannot exceed two thousand dollars, exclusive of interest and costs as taxed; except where it is brought upon a bond or undertaking, given in an action or special proceeding in the same court, or before a justice thereof; or to recover damages for a breach of promise of marriage; or where it is a marine cause as that expression is defined in the next section. Where the action is brought upon a bond or other contract, the judgment must be for the sum actually due, without regard to a penalty therein contained; and, where the money is payable in installments, successive actions may be brought for the installments, as they become due.

2. In an action to recover one or more chattels, a judgment cannot be rendered in favor of the plaintiff, for a chattel or chattels, the aggregate value of which exceeds two thousand dollars. (Co. Civ. Proc. § 316). Several actions between the same parties may be consolidated in the city court of the city of New York under section 817, of the code of civil procedure, and a judgment rendered for the aggregate amount of the claims, provided the sum sued for in each action does not exceed two thousand dollars. (*Bush v. Abrahams*, 18 N. Y. St. Rep. 919).

It also has jurisdiction of what are known as marine causes, and in such causes it has the same jurisdiction as the supreme court, that is to say:

1. An action in favor of a person, belonging to a vessel in the merchant service, against the owner, master, or commander thereof, for the reasonable value of services, or for the breach of a contract to pay for services rendered or to be rendered on board of the vessel, during a voyage, wholly or partly performed, or intended to be performed by it.

2. An action in favor of or against a person, belonging to or on board of a vessel in the merchant service, to recover damages for an assault, battery, or false imprisonment committed on board the vessel, upon the high seas, or in a place without the United States. But this section does not confer upon the city court authority to proceed, as a court of admiralty or maritime jurisdiction. (Co. Civ. Proc. § 317). Neither this court nor any of the justices of it have power to naturalize an alien. (Co. Civ. Proc. § 318). The court has no equitable jurisdiction. (*McMahon v. Rauhr*, 3 Daly, 116; 47 N. Y. 67, 71; *Cushing v. Family Fund Soc.*, 28 N. Y. St. Rep. 757). Equitable defenses may be pleaded, however (*Mack v. Kittell*, 20 Abb. N. C. 293); but not as counter-claims. (*Richards v. Littell*, 16 Misc. 339). It has also been held that this court must grant an order of interpleader, under section 820 of the code of civil procedure, in an appropriate case, and the action then becomes one in equity. (*Smith v. Emigrant Industrial*

Savings Bk., 17 N. Y. St. Rep. 852). An order of consolidation under section 817 of the code of civil procedure will not be granted where the aggregate amount carries the court beyond its monetary limitation. (*Gillin v. Canary*, 19 Misc. 594). In an action brought in the city court an order cannot be made or a warrant of attachment granted by an officer other than a justice of the court, and each provision of the code of civil procedure which empowers an officer other than a judge of the court in which an action is brought, to make an order therein, must be construed as being exclusive of an action brought in the city court. (Co. Civ. Proc. § 327).

The mandate of the court can be executed only within the city of New York, generally speaking, but there are several exceptions to this general rule. (Co. Civ. Proc. § 338).

The practice in the city court of the city of New York differs in many details from that in the Supreme Court. (Co. Civ. Proc., Chapter XX, Title I).

Sec. 6. County Courts.

There is a county court in each county of the state, except the county of New York. These courts are continued in existence by the constitution of 1894. (Const. Art. 6, § 14). It is provided in that article, that the county courts shall have the power and jurisdiction they then possessed, and also original jurisdiction in actions for the recovery of money only where the defendants reside in the county, and in which the complaint demands judgment for a sum not exceeding two thousand dollars. The constitution gives to the legislature power to reform, enlarge or restrict the jurisdiction of the county courts, provided however, that their jurisdiction shall not be so extended as to authorize an action therein for the recovery of money only, in which the sum demanded exceeds two thousand dollars, or in which any person, not a resident of the county, is defendant. The jurisdiction of the court extends to the following actions and special proceedings, in addition to the jurisdiction, power and authority, conferred upon a county court, in a particular case, by special statutory provisions:

1. To an action for the partition of real property; for dower; for the foreclosure, redemption or satisfaction of a mortgage upon real property; or to procure a judgment requiring a specific performance of a contract, relating to real property; where the real property, to which the action relates, is situated within the county; or to foreclose a lien upon a chattel, in a case specified in section seventeen hundred and thirty-seven of this act, where the lien does not exceed one thousand dollars in amount, and the chattel is found within the county.

2. To an action in favor of the executor, administrator or assignee of a judgment creditor, or in a proper case, in favor of the judgment-creditor, to recover a judgment for money remaining due upon a judgment rendered in the same court.

3. To an action for any other cause, where the defendant is, or, if there are two or more defendants, where all of them are, at the time of the commencement of the action, residents of the county, and wherein the complaint demands judgment for a sum of money only, not exceeding two thousand dollars; or to recover one or more chattels, the aggregate value of which does not exceed one thousand dollars, with or without damages for the taking or detention thereof.

4. To the custody of the person and the care of the property, concurrently with the supreme court, of a resident of the county, who is incompetent to manage his affairs, by reason of lunacy, idiocy or habitual drunkenness; and to every special proceeding which the supreme court has jurisdiction to entertain, for the appointment of a committee of the person or of the property of such an incompetent person or for the sale or other disposition of the real property situated within the county of a person, wherever resident, who is so incompetent for either of the reasons aforesaid, or who is an infant; or for the sale or other disposition of the real property situated within the county of a domestic religious corporation. (Co. Civ. Proc. § 340). For the purpose of determining the jurisdiction of the county court, in either of the cases specified in the last section, a domestic corporation or joint stock asso-

ciation, whose principal place of business is established by, or pursuant to a statute, or by its articles of association, or is actually located within the county, or in case of a railroad corporation where any portion of the road operated by it is within the county, it is deemed a resident of the county; and personal service of the summons, made within the county as prescribed in this act, or personal service of a mandate, whereby a special proceeding is commenced, made within the county, as prescribed in the code of civil procedure for personal service of a summons, is sufficient service thereof upon a domestic corporation wherever it is located. (Co. Civ. Proc. § 341). Wherever a county court has jurisdiction of an action or special proceeding, it possesses the same jurisdiction, power and authority in it and in the proceedings therein, which the supreme court possesses in a like case, and it may render any judgment, or grant either party any relief, which the supreme court may render or grant in a like case, and may enforce its mandates in like manner as the supreme court. County judges possess the same power and authority, which a justice of the supreme court possesses, in a like action or special proceeding, brought in that court. (Co. Civ. Proc. § 348). In any action or special proceeding in which the county court has jurisdiction, it has power to send its process or other mandates into any county of the state, for service or execution, and to enforce obedience thereto, with like power and authority as the supreme court. (Co. Civ. Proc. § 347). The county court is not a court of general, but of limited jurisdiction, and all the facts necessary to give it jurisdiction must appear in the record. (*Ford v. Ford*, 6 N. Y. 176). But a general appearance, and demand of a copy of the complaint in an action in the county court, is a waiver of any objection to the jurisdiction, although neither of the parties to the action is a resident of the county. (*Donnelly v. Woolsey*, 38 St. Rep. 39; 13 Supp. 433; 39 St. Rep. 748; 15 Supp. 490; see, however, *Weidman v. Sibley*, 16 App. Div. 616). The court can not obtain jurisdiction against

a foreign corporation however, even by its consent and general appearance in the action. (*Parkhurst v. Rochester L. M. Co.*, 65 Hun, 489). In an action commenced in that court, if it appears by the summons and complaint, which are served together, that judgment is asked for a greater sum than the court has power to grant, the court has no jurisdiction. (*McIntyre v. Carriere*, 17 Hun, 64). In an action of partition, brought in that court, it has jurisdiction to try the title of the parties (Co. Civ. Proc. § 1543), but, it would seem, in no other case. (*Wilkins v. Williams*, 15 Civ. Pro. Rep. 168). It also has jurisdiction to direct a judgment canceling a deed, if necessary to enable it to make partition. (*Bell v. Gittere*, 30 St. Rep. 219). It has jurisdiction of an action for strict foreclosure of a mortgage, if part of the mortgaged premises are within the county, although the mortgage embraces other premises, not within the county (*Strong v. Eighme*, 41 How. Pr. 117); it also has jurisdiction of an action to compel the satisfaction of a mortgage, of which the defendant after agreeing to pay, has taken an assignment, and seeks to enforce. (*Mosher v. Campbell*, 30 Hun, 230). In an action to foreclose a mortgage it may reform the conditions of the bond in relation to the time for which interest is to be computed (*Meade v. Langford*, 56 Hun, 279), and may also grant a judgment for deficiency for any amount. (*Hawley v. Whalen*, 64 Hun, 551). It can not, however, in such an action, grant equitable relief by reforming the mortgage, although the relief asked may be that the mortgage, after being reformed, may be foreclosed. The two remedies are entirely independent, and the reformation is not a necessary incident to the foreclosure. (*Avery v. Willis*, 24 Hun, 548; *Thomas v. Harmon*, 122 N. Y. 84). Actions which have begun in a court of a justice of the peace, and discontinued therein on plea of title, may be brought in a county court pursuant to an undertaking given upon such discontinuance (Co. Civ. Proc. § 2953), and in such a case it is no objection to the jurisdiction that the defendant is a non-resident of the county. (*C. & R. Plank Road Co. v. Parker*, 22 Barb.

223). It has jurisdiction of proceedings under the general assignment act. (3 R. S. 9 Ed. 2429-2439). The powers of the court in such proceeding are specified in section 20 of that act (3 R. S. 9 Ed. 2435), but in such proceeding, it has no power to set aside a sale made by the assignee, because the price is insufficient (*Matter of Rider*, 23 Hun, 191), or to examine into an alleged fraudulent transfer by the assignor, to a former assignee, who has been cited to account before it. (*Matter of Raymond*, 27 Hun, 508). The court has power to make an order, amending the inventory of an assignee *nunc pro tunc*, so as to conform to the statement of the debt in the assignment. (*Roberts v. Buckley*, 145 N. Y. 215). The court also has jurisdiction, upon the application of a person who has been fined by a court, or of a person whose recognizance has become forfeited, or of his surety, to remit the fine, or the forfeiture of the recognizance, or part of the penalty thereof, or it may discharge the recognizance. (Co. Civ. Proc. § 350). It has, also, jurisdiction of the foreclosure of certain mechanics' liens, or liens of laborers within the county (3 R. S. 9 Ed. 2409, § 4, 2483, § 5); and of proceedings for drainage of swamps, marshes, and other low lands. (2 R. S. 9 Ed. 1925, § 20). In an action for the foreclosure of a mechanic's lien, the court may take jurisdiction, although the defendant be not a resident of the county. (*Raven v. Smith*, 71 Hun, 197). Jurisdiction has also been given the court to correct assessments, where the premises of one person shall have been wrongfully assessed and taxed in with the premises of another (3 R. S. 9 Ed. 2407); and to order that the board of supervisors cause to be refunded to any person the amount collected from him of any tax illegally or improperly assessed, or levied. (County Law § 16). This power of the county court is limited to a direction that the tax be refunded; it has no power to order a tax to be canceled before payment or restrain its collection. (*Matter of B. M. G. L. Co.*, 144 N. Y. 228). The court cannot, by virtue of its power derived from this provision, direct part of a tax to be refunded on the ground

that the tax was excessive. (*Matter of Baumgarten*, 39 App. Div. 174). The court may, however, in a proper case, make an order requiring taxes illegally or improperly assessed and collected within the period of the six years prescribed by the statute of limitations, to be refunded. (*Matter of Edison El. Illum. Co.*, 22 App. Div. 371; *affd. on opinion below*, 155 N. Y. 699). This provision of the county law applies only to a payment under compulsion and when the taxes were voluntarily paid, the board of supervisors cannot be ordered by the court to repay them. (*Matter of McCue v. Supervisors*, 162 N. Y. 235; *Matter of Adams v. Supervisors*, 154 N. Y. 619). The procedure is informal and not governed by any established rules of procedure. (*Id.*, *semble*). It also has authority to permit a general guardian of an infant, or the committee of an idiot, lunatic, or habitual drunkard, who is the owner of real property, in joint tenancy or tenancy in common to agree to a partition of the same. (Co. Civ. Proc. § 1590 *et seq.*). It has exclusive jurisdiction, outside of the city of New York, of applications by an insolvent debtor to be discharged from his debts (Co. Civ. Proc. § 2150); or to be exempt from arrest, or discharged from imprisonment (Co. Civ. Proc. § 2188); or of an imprisoned debtor to be discharged from imprisonment (Co. Civ. Proc. § 2201); with the supreme court, it has jurisdiction of the appointment of trustee of a person confined for crime. (Co. Civ. Proc. § 2219). It also has power to allow any person of full age to change his name. (Co. Civ. Proc. § 2410). By chapter 384 of the Laws of 1895. the county court was given jurisdiction of a proceeding by the owner of agricultural lands to drain his lands through the lands of others, the cost of the work to be assessed upon the various land owners in proportion to benefits received. This legislation has been held, however, to contravene the provisions of the fourteenth amendment of the federal constitution. (*Matter of Tuthill*, 163 N. Y. 133). The county court has, also, jurisdiction to appoint commissioners to lay out a highway. (Highway Law [Chap. 568, L. 1890] § 83).

Appeals are taken to this court from judgments of the court of a justice of the peace. (Co. Civ. Proc. § 3045). The county court is always open for the transaction of any business, for which notice is not required to be given to the adverse party, except where it is especially prescribed by law that the business must be done at a stated term. (Co. Civ. Proc. § 355).

Sec. 7. Power of Judges out of Court.

For the convenience of suitors, and the dispatch of business, judges, out of court, are empowered to make orders in many cases where notice is not required to be given to the adverse party, or where such notice is discretionary, or which only have regard to the routine of an action or special proceeding. Section 235 of the code of civil procedure, directs that each justice of the supreme court must, at all reasonable times, when not holding court, transact such judicial business as may be done out of court. But a judge out of court has only a limited jurisdiction. He may do what the statute authorizes, and he can do nothing more. (*Bangs v. Selden*, 13 How. Pr. 374, 376). He has no jurisdiction, even in the first judicial district, to issue a writ of mandamus out of court, nor to issue any other writ, which the law expressly provides must be done by the court. (*Peo. ex rel. Lower v. Donovan*, 135 N. Y. 75). A judge of a county court within his county possesses, and is required to exercise, the power which is conferred by law in general language, upon a justice of the supreme court, out of court. (Co. Civ. Proc. § 241). He also possesses the same power and authority in a special proceeding which can be lawfully instituted before him out of court, which a justice of the supreme court possesses in a like proceeding instituted in the same manner before him. (Co. Civ. Proc. § 349). In any action or special proceeding, pending in a county court, an order may be made, without notice, or an order to stay proceedings may be made upon notice, by a justice of the supreme court, or by the county judge of the

county where the attorney resides, in an action where the county judge in whose court the action or proceeding is pending, may make the same out of court. (Co. Civ. Proc. § 354). In the first judicial district, a motion which elsewhere must be made in court, may be made to a judge out of court, except for a new trial on the merits. (Co. Civ. Proc. § 770). Where an order, in an action, may be made by a judge of the court, out of court, and without notice, and the particular judge is not specially designated by law, it may be made by any judge of the court, in any part of the state; or except to stay proceedings after verdict, report, or decision, by a justice of the supreme court, or by the county judge of the court where the action is triable, or in which the attorney for the applicant resides. Where such an order grants a provisional remedy, it can be vacated only in the mode specially prescribed by law; in any other case, it may be vacated or modified, without notice, by the judge who made it, upon notice, by him, or by the court. (Co. Civ. Proc. § 772). The limitation contained in section 772, of the county judges who may make an order, does not apply to a case where it is prescribed in general words that a particular order may be made by a county judge, or by any county judge. (Co. Civ. Proc. § 773). A judge of any court can make an order to show cause, returnable before himself, or at special term (General Rule, 37), and an order to show cause, returnable at special term, in an action in the supreme court, may be made by a county judge of the county where the action is triable, or in which the attorney for the applicant resides. (Co. Civ. Proc. § 780). But in such an action a county judge can not make an order to show cause, returnable before himself. (*Parmenter v. Roth*, 9 Abb. Pr. N. S. 385). But in *Babcock v. Clark*, (23 Hun, 391), it was held that a county judge might make an order, in an action pending in the supreme court, to show cause returnable before himself, why a temporary injunction should not be granted; the reason for this holding was, that by section 609 of the code of civil procedure, the judge could require notice of the application or not, at his discretion,

and the order to show cause was equivalent to requiring notice. It is not necessary in this article to specify the particular acts, which may be done by a judge out of court. Careful provisions are made in the code as to who may make the various orders, or grant the different remedies, which may be required during the progress of an action, and as each one is treated of, attention will be called to the regulations made upon that subject.

CHAPTER II.

ACTIONS AND THE TIMES OF COMMENCING THEM.

ARTICLE I...Of actions.

ARTICLE II...The limitation of actions.

ARTICLE I.

OF ACTIONS.

The word "action," when applied to judicial proceedings signifies an ordinary prosecution in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. (Co. Civ. Proc. § 3333). Every other prosecution by a party, for either of the purposes specified in the last section, is a special proceeding. (Co. Civ. Proc. § 3334). There are two kinds of actions, civil and criminal. (Co. Civ. Proc. § 3335). A criminal action is prosecuted by the people of the state as a party, against a person charged with a public offense for the punishment thereof. (Co. Civ. Proc. § 3336). Every other action is a civil action. (Co. Civ. Proc. § 3337). Criminal actions will not be treated of in this book, but it is confined solely to the practice of civil actions and special proceedings. There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits have been abolished. (Co. Civ. Proc. § 3339). The intention of the legislature, in adopting this section, was expressed in the preamble to the code of procedure, which was passed in April, 1848, that the then existing forms of action and pleadings, in cases at common law,

should be abolished, that the distinction between legal and equitable remedies should no longer continue, and that a uniform course of procedure, in all cases, should be established. The object of this was, that all controversies respecting the matter involved in litigation, should be determined in one action (*Manderille v. Reynolds*, 68 N. Y. 528, 545); and the legislature intended to abolish, and has abolished, all the features which distinguished legal and equitable actions from each other, and has established a single action for the pursuit of all remedies. A mistake or misconception in respect to the action being called legal or equitable, does not defeat the plaintiff, but, at most, may require a trial before a properly constituted court. The object of every action is to obtain a judgment finally determining the rights of the parties in regard to the controversy involved, and the question which is intended to be presented in each case is, whether the plaintiff is entitled to any relief whatever, upon the facts which he has presented to the court, or *e converso*, whether any facts which the defendant presents to the court, are sufficient to defeat the recovery which the plaintiff seeks; and so the courts have held that in every case, the plaintiff may state all the facts from which arise the right which he claims, and also all the facts tending to show that his right has been violated, and upon that statement the court is to grant him whatever relief he is entitled. (*Phillips v. Gorham*, 17 N. Y. 270; *The New York Ins. Co. v. The N. W. Ins. Co. of Oswego*, 23 N. Y. 357; *Sternberger v. McGovern*, 56 N. Y. 12; *Hoppough v. Struble*, 60 N. Y. 430; *Manderille v. Reynolds*, 68 N. Y. 528; *Glacken v. Brown*, 39 Hun, 294). It is not intended by these provisions of the code to abolish the distinction between what was formerly known as legal and equitable relief. These exist in the nature of things, and the distinction between the manner of obtaining them, is, to some extent, preserved by the provision of the constitution, which preserves the right of trial by jury, in all cases in which it had been used before 1846. Therefore, when the judgment to which the plaintiff is entitled, was that which

was formerly obtained in an action at law, the constitution requires a different mode of trial, from that which is to be had when equitable relief only is sought, but it does not follow from this, that the plaintiff should be turned out of court because the facts, which he alleges, did not entitle him to relief of the kind which he asks. If he asks for equitable relief in an action which he has brought, and the facts proved upon the trial fail to establish his right to the relief which he asks, but do show that he is entitled to a judgment at law, it is the duty of the court not to dismiss the complaint, but to retain the case, that his action may be tried in the manner in which an action at law is required to be tried, and that his claim may be finally disposed of. (Cases cited *supra*).

ARTICLE II.

THE LIMITATION OF ACTIONS.

SECTION.

1. Actions for the Recovery of Real Property.
2. Actions other than for the Recovery of Real Property,
3. Non-residence or absence from the State.
4. What prevents the running of the Statute.
5. What actions are not within the Statute.
6. Mode of computing time.
7. Defense and counter-claim.
8. What takes a case out of the Statute.
9. How objection taken.
10. Cases not within the Statute.
11. When action deemed begun.

Sec. 1. Actions for the Recovery of Real Property.

The people of the state will not sue a person for or with respect to real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless either :

1. The cause of action accrued within forty years before the action is commenced ; or

2. The people, or those from whom they claim, have received the rents and profits of the real property, or of some part thereof, within the same period of time. (Co. Civ. Proc. § 362). An action shall not be brought for

or with respect to real property by a person claiming by virtue of letters patent or a grant from the people of the state, unless it might have been maintained by the people as prescribed in this title, if the patent or grant had not been issued or made. (Co. Civ. Proc. § 363). An action by the people to repeal letters patent is an action in respect to lands within this statute. (*People v. Clark*, 9 N. Y. 349). The people are barred only by an adverse possession of forty years. (*People v. Clark, supra*; *People v. Arnold*, 4 N. Y. 508). To bar the title of the people within this statute, there must have been actual possession; constructive possession is not sufficient (*People v. Livingston*, 8 Barb. 253); but in *People v. Van Rensselaer*, (9 N. Y. 291), it was held, that where lands had been granted by royal letters patent, and a portion of them had been occupied, and as to the remainder, the grantee had regularly paid the taxes therefor, and had paid quit rents to the state, in pursuance of the grant, until commuted in accordance with the statute, and had maintained men to protect the timber from trespass, that such possession was sufficient to bar an action by the people within this statute. Title is not presumed in favor of the people, until it is shown that the premises have been vacant for twenty years. (*People v. Rector of Trinity Church*, 22 N. Y. 44). No easement can be acquired in the public waters of the state, by forty years' use adverse to the people. (*Burbank v. Fay*, 65 N. Y. 57). Unless the claimant against the state actually has hostile possession of the land, the people will be deemed to have received the rents and profits in applying this statute. (*G. V. R. R. Co. v. Slaight*, 49 Hun, 35).

An action to recover real property, or the possession thereof, cannot be maintained by a party, other than the people, unless the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action. (Co. Civ. Proc. § 365). A defense or counter-claim, founded upon title to real property, or to rents or services out of the same, is not

effectual, unless the person making it or under whose title it is made, or his ancestor, predecessor or grantor, was seized or possessed of the premises in question within twenty years before the committing of the act with respect to which it is made. (Co. Civ. Proc. § 366). An action for dower must be commenced by a widow, within twenty years after the death of her husband. (Co. Civ. Proc. § 1596). The limitation begins to run from the time the holding begins to be adverse. (*Jackson v. Parker*, 3 Johns. Cases, 124). As against a remainder man, the statute begins to run from the determination of the particular estate. (*Jackson v. Johnson*, 5 Cow. 74; *Graham v. Livingston*, 19 How. 246; *Christie v. Gage*, 71 N. Y. 189). If when the particular estate ceases, the remainder man is under disability, the statute does not begin to run until the disability ceases. (*Jackson v. Sellick*, 8 Johns. 62). Where an adverse possession begins during the life of the ancestor, it continues to run against the heir, although he is an infant when the title descends to him. (*Becker v. Van Valkenburgh*, 29 Barb. 319). Twenty years adverse possession is a good defense in an action of ejectment brought by a married woman. (*Clarke v. Gibbons*, 83 N. Y. 107). The statute applies against a religious corporation (*Refd. Ch. of Gallupville v. Schoolcraft*, 65 N. Y. 134), and in its favor. (*Humbert v. Rector Trinity Ch.*, 24 Wend. 587). The trustees of a school district may obtain title by adverse possession. (*Robie v. Sedgwick*, 35 Barb. 319; *affd.* 4 Abb. Dec. 73). An action of ejectment by an owner, against a purchaser in possession under a void sale on foreclosure, is not barred until twenty years after the sale (*Shriver v. Shriver*, 86 N. Y. 575); but an action by one claiming to be the owner of land of which the mortgagee is in possession, for an accounting, is not within section 365 of the statute (*Miner v. Beekman*, 50 N. Y. 337; *Hubbell v. Sibley*, *Id.* 468), but is within section 379. An action to restrain the maintenance of a nuisance on real property, or for a continuous trespass, is not barred until the expiration of twenty years from which a grant

is presumed (*Knox v. Metro. Ele. R. Co.* 58 Hun, 517; affd. 128 N. Y. 625), but in such an action no damages can be recovered for more than six years before the commencement of the action. (*Doyle v. Man. Ele. R. Co.*, 35 St. Rep. 373; 128 N. Y. 488; *Galway v. Metro. Ele. R. Co.*, 128 N. Y. 132). A title acquired by twenty years adverse possession, is not forfeited by an interruption of the actual possession, after that time. (*Sherman v. Kane*, 86 N. Y. 57). An entry upon real estate is not sufficient or valid as a claim, unless an action is commenced thereupon, within one year after the making thereof, and within twenty years after the time, when the right to make it descended or accrued. (Co. Civ. Proc. § 367). In an action to recover real property, or the possession thereof, the person who establishes a legal title to the premises, is presumed to have been possessed thereof within the time required by law; and the occupation of the premises by another person, is deemed to have been under, and in subordination to the legal title, unless the premises have been held and possessed, adversely to the legal title, for twenty years before the commencement of the action. (Co. Civ. Proc. § 368). The burden of establishing adverse possession is on the person who alleges it. (*Stevens v. Hauser*, 39 N. Y. 302). Where the occupant, or those under whom he claims, entered into possession of the premises, under the claim of title, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court; and there has been a continued occupation and possession of the premises, included in the instrument, decree, or judgment, or of some part thereof, for twenty years under the same claim; the premises so included are deemed to have been held adversely; except that where they consist of a tract, divided into lots, the possession of one lot is not deemed a possession of any other lot. (Co. Civ. Proc. § 369). For the purpose of constituting an adverse possession, by a person claiming a title, founded upon a written instrument, or a judgment or decree, land is

deemed to have been possessed or occupied in either of the following cases:

1. Where it has been usually cultivated and improved.

2. Where it has been protected by a substantial inclosure.

3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, either for the purposes of husbandry, or for the ordinary use of the occupant.

Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time, as the part improved and cultivated. (Co. Civ. Proc. § 370). To bring the case within these two sections of the statute, the deed under which the claim is made must include the premises. (*Jackson v. Woodruff*, 1 Cow. 286). The inclosure must be such as to give notice that the land is claimed. (*Bolton v. Shriever*, 49 Super. 168). If the fences are generally maintained, and removed in the winter, leaving the posts standing, and replaced in the spring, that is a sufficient inclosure to satisfy the statute. (*Trustees of East Hampton v. Kirk*, 68 N. Y. 459). To constitute a sufficient constructive possession under this statute, the part not actually occupied must be used with, or in subservience to, that which is actually occupied. (*Gooding v. Richards*, 20 Wk. Dig. 543). Going on part of unoccupied lands, and cutting timber from time to time is not a sufficient constructive possession. (*Thompson v. Burhans*, 79 N. Y. 93). It is sufficient if the part not occupied is used to pile wood, and for other purposes, for the benefit of any part which is occupied. (*Dominy v. Miller*, 33 Barb. 386). The occupation of the upland, under a deed extending to low water mark, and cutting grass upon that part, between high and low water mark, is not sufficient constructive possession of the land between high and low water mark. (*Roberts v. Baumgarten*, 110 N. Y. 380).

Sub-division 2 of section 270, does not apply when the tract of land, included within the deed, is too large to be used as one body. An occupation of 400 acres, in a tract of twenty-five thousand, has been held not sufficient. (*Thompson v. Burhans*, 61 N. Y. 52). The occupation of two acres, in a tract of seven hundred and eighty-three, was held not sufficient (*Jackson v. Woodruff*, 1 Cow. 276), but in *Munro v. Merchant*, (28 N. Y. 9), where the grantee of a large tract of uncultivated land, entered upon it under his deed, and made extensive valuable and permanent improvements, and erected buildings, and paid taxes thereon, and the cleared portion was continuously occupied by him, under claim of title to the whole tract, and the uncleared portion was extensively used, for cutting timber for the market, and for fences and fire wood, it was held that that was a sufficient constructive possession, to bring the case within section 370. Where there has been an actual continued occupation of premises, under claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely. (Co. Civ. Proc. § 371). For the purpose of constituting an adverse possession, by a person claiming title, not founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed or occupied in either of the following cases, and no others:

1. Where it has been protected by a substantial inclosure.

2. Where it has been usually cultivated or improved. (Co. Civ. Proc. § 372). The adverse possession under these two sections, can extend only to the lands which are actually fenced, cultivated or improved (*Becker v. Van Valkenburgh*, 29 Barb. 319), and the inclosure must be a substantial one; a possession fence, so called, made by falling trees in such a way that they lapped over one another, is not sufficient. (*Jackson v. Schoonmaker*, 2 Johns. 230). Where it was fenced on two sides, and the other two sides were inclosed by a natural barrier of rock, that was held to be a sufficient inclosure

to satisfy the requirements of the statute. (*Becker v. Van Valkenburgh, supra*). A lot is not protected by a substantial inclosure, when it is inclosed on one side by the highway, on two sides by fences, and on the remaining side by a line of marked trees. (*Pope v. Hanmer*, 74 N. Y. 240). The cultivation or improvement must be actual and substantial. (*Doolittle v. Tice*, 41 Barb. 181). Cutting grass or logs, or piling wood upon it are not enough, or occasionally using it for pasture. (*Pope v. Hanmer, supra*; *Wheeler v. Spinola*, 54 N. Y. 377; *Miller v. Downing*, 54 N. Y. 631; *Thompson v. Burhans*, 79 N. Y. 93). To be the foundation of an adverse possession the claim must be of a title. (*Robinson v. Phillips*, 56 N. Y. 634). Mere possession without a claim of title is not adverse. (*Bridges v. Wyckoff*, 67 N. Y. 130; *Sturges v. Parkhurst*, 50 Super. 306). And to be adverse to the owner of the fee, it must be of the whole title, and not of a lease for years. (*Bedell v. Shaw*, 59 N. Y. 46; *Howard v. Howard*, 17 Barb. 663). It is not necessary that the deed under which possession is claimed, should be valid. A deed given without right in the grantor is sufficient to sustain the claim (*Sands v. Hughes*, 53 N. Y. 287), and after possession is taken under color of title, it becomes adverse, although the claim is groundless. (*LaFrombois v. Jackson*, 8 Cow. 589). It is not material that the claim is fraudulent, or that the occupant knows that it is groundless. (*Humbert v. Trinity Ch.*, 24 Wend. 587). The case of *Livings-ton v. The Peru Iron Co.*, (9 Wend. 512), which holds that the possession is not adverse if the deed is fraudulently obtained, arose under the champerty act, and does not apply to an adverse claim under these sections. (*Crary v. Goodman*, 22 N. Y. 177). Nor is it material that the owner is ignorant of the claim made, if it is open and notorious. (*Humbert v. Trinity Ch.*, 24 Wend. 587). Where the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years after the termination of the tenancy; or, where there has been no written lease, until the expiration of twenty years after the last payment of

rent; notwithstanding that the tenant has acquired another title, or has claimed to hold adversely to his landlord. But this presumption shall not be made, after the periods prescribed in this section. (Co. Civ. Proc. § 373). This section does not apply to a grant in fee, subject to a quit rent reserved. (*People v. Trinity Ch.*, 22 N. Y. 44). The tenant under an assessment lease, cannot hold adversely to the owner of the fee (*Bedell v. Shaw*, 59 N. Y. 46), but it is otherwise, as to one who has taken a grant in fee from the tenant, and who enters and holds under the grant. (*Sands v. Hughes*, 53 N. Y. 287). If the tenant has entered under a perpetual lease, the presumption is that it still exists, and that he is in under it. (*Bradt v. Church*, 110 N. Y. 537). The right of a person to the possession of real property is not impaired or affected, by a descent being cast, in consequence of the death of a person in possession of the property. (Co. Civ. Proc. § 374). If a person who might maintain an action to recover real property, or the possession thereof, or make an entry, or interpose a defense or counter-claim, founded on the title to real property, or to rents or services out of the same, is, when his title first descends, or his cause of action, or right of entry first accrues, either:

1. Within the age of twenty-one years; or,
2. Insane; or,
3. Imprisoned on a criminal charge or in execution upon conviction of a criminal offense, for a term less than for life,

The time of such a disability is not a part of the time, limited in this title, for commencing the action, or making the entry, or interposing the defense or counter-claim; except that the time so limited cannot be extended more than ten years, after the disability ceases, or after the death of the person so disabled. (Co. Civ. Proc. § 375). The statute begins to run, although the plaintiff is out of the state, at the time when his right accrues. (*Power v. Hathaway*, 43 Barb. 214). When the statute once begins to run, it continues notwithstanding a subsequent disability. (*Peck v. Randall*, 1 Johns. 165; Co. Civ. Proc. § 408). If an adverse possession be-

gins in the lifetime of the ancestor, it continues although the land descends to his infant heir. (*Jackson v. Moore*, 13 Johns. 513; *Jackson v. Robins*, 15 Johns. 169). A party has in any event, twenty years to bring suit; if he is under disability when his right accrues, he may, notwithstanding the twenty years have expired, sue within ten years after the disability is removed. (*Jackson v. Cains*, 20 Johns. 301; *Willson v. Betts*, 4 Den. 201). He is always entitled to twenty years, and to so much more as the disability would add, but such addition cannot be more than ten years after the determination of the disability. (*Howell v. Leavitt*, 95 N. Y. 617). The insanity of the defendant does not suspend the running of the statute against the true owner. (*Sanford v. Sanford*, 62 N. Y. 553).

Sec. 2. Actions Other Than Recovery of Real Property.

Subdivision 1.—WITHIN TWENTY YEARS.

A final judgment or decree for a sum of money, or directing the payment of a sum of money, heretofore rendered in a surrogate's court of the state, or heretofore or hereafter rendered in a court of record within the United States, or elsewhere, or hereafter docketed pursuant to the provisions of section thirty hundred and seventeen of this act, is presumed to be paid and satisfied, after the expiration of twenty years from the time when the party recovering it was first entitled to a mandate to enforce it. This presumption is conclusive, except as against a person who, within twenty years from that time, makes a payment or acknowledges an indebtedness of some part of the amount recovered by the judgment or decree, or his heir or personal representative, or a person whom he otherwise represents. Such an acknowledgment must be in writing, and signed by the person to be charged thereby. (Co. Civ. Proc. § 376). This section does not apply to judgments other than those requiring the payment of money and such judgments may be enforced at any time, even after the expiration of twenty years. Whether, however, they will be so enforced is within the discretion of the court. (*Van Rensselaer v. Wright*, 121

N. Y. 626; *Whitney v. De La Rionda*, 125 N. Y. 678). The law laid down in the case of *Dieffenbach v. Roch*, (112 N. Y. 621), which holds that the six year limitation applies to judgments of justices of the peace, although they have been docketed in the clerk's office, pursuant to section 3017 of the code, has been changed by the amendment of 1894, which appears in the section as quoted above. (*Raphael v. Mencke*, 28 App. Div. 91). The period of limitation upon decrees of the surrogate's court, was formerly six years (*Paff's Err. v. Kinney*, 1 Bradf. 1; *Arnold v. Downing*, 11 Barb. 554), but by this section it has become twenty years. The city court of the city of New York, being now a court of record, judgments rendered in that court are within this section, although the judgment was rendered by that court before it was made a court of record. (*Camp v. Hallen*, 42 Hun, 628). An action on an award for property, taken by a city upon opening a street, is an action upon a judgment under this statute, and is not barred until after the lapse of twenty years. (*Donnelly v. City of Brooklyn*, 121 N. Y. 9). The confirmation by a county court of the report of a referee, in a proceeding to sell the real estate of an habitual drunkard to pay his debts, which report found that a certain claim presented was a valid claim, is not a judgment within the meaning of section 376. (*Sheldon v. Mirick*, 144 N. Y. 498). This statute relates only to the remedy by action upon the judgment, and it does not take away the right to issue execution. (*Kincaid v. Richardson*, 25 Hun, 237). If the proof of payment, under section 376, consists of the return of an execution partly satisfied, the adverse party may show, in full avoidance of the effect thereof, that the alleged partial satisfaction did not proceed from a payment made, or a sale of property claimed, by him, or by a third person whom he represents. (Co. Civ. Proc. § 377). A person may avail himself of the presumption created by section 376, under an allegation that the action was not commenced, or that the proceeding was not taken, within the time therein limited. (Co. Civ. Proc. § 378). An action to redeem real property from a mortgage, with or without an account of rents and profits, may be maintained by the

mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises, for twenty years after the breach of a condition of the mortgage, or the non-fulfillment of a covenant therein contained. (Co. Civ. Proc. § 379). This changes the rule laid down in *Miner v. Beckman* (50 N. Y. 337), and *Hubbell v. Sibley* (50 N. Y. 468). (*Shriver v. Shriver*, 86 N. Y. 580, Folger, J.). But where the mortgagee has improperly sold the property and the action is brought by the mortgagor for an accounting, it is not within this section, but is governed by section 382; it is therefore barred in six years from the receipt of the money. (*Mills v. Mills*, 115 N. Y. 80). The statute does not run against an action to remove a cloud upon a title of one in possession of land, as the cause of action is deemed a continuous one. (*Smith v. Reid*, 134 N. Y. 568). The same rule applies to an action brought by the taxpayers of a county to cancel invalid bonds which are made by statute a lien upon the property of the town. (*Strang v. Cook*, 47 Hun, 46).

An action upon a sealed instrument must be commenced within twenty years, and where the action is brought for a breach of a covenant of seizin or against incumbrances, the cause of action is, for the purposes of this action only, deemed to have accrued upon an eviction, and not before. (Co. Civ. Proc. § 381). An action for the specific performance of a contract under seal, is not within this section (*Peters v. Delaplain*, 49 N. Y. 362), nor is an action to enforce the payment of a legacy, charged upon the land. (*Loder v. Hatfield*, 71 N. Y. 92). An action to foreclose a mortgage given as security for a simple contract debt, is within this statute, and may be brought after six years, although the right to sue upon the debt, which it is given to secure, is barred by the statute of limitations. (*Hulbert v. Clark*, 128 N. Y. 295). Where one by deed, has assumed the payment of a mortgage, an action upon his covenant is an action upon a sealed instrument, and is within this section, and is not barred within six years. (*N. Y. Li. Ins. Co. v.*

Aitkin, 125 N. Y. 660). An action for an accounting between partners, founded on a covenant, or any partnership agreement under seal, that losses or expenses should be borne by them in equal proportion, is an action upon a sealed instrument under this section. (*Dwinelle v. Eddy*, 102 N. Y. 423).

Subdivision 2.—WITHIN SIX YEARS.

The following actions must be commenced within six years:

1. An action upon a contract obligation or liability, express or implied; except a judgment or sealed instrument.

2. An action to recover upon a liability created by statute; except a penalty on forfeiture.

3. An action to recover damages for an injury to property, or a personal injury; except in a case where a different period is expressly prescribed in this chapter.

4. An action to recover a chattel.

5. An action to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, 1846, was cognizable by the court of chancery. The cause of action, in such a case, is not deemed to have accrued, until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

6. An action to establish a will. Where the will has been lost, concealed, or destroyed, the cause of action is not deemed to have accrued, until the discovery by the plaintiff, or the person under whom he claims, of the facts upon which its validity depends.

7. An action upon a judgment or decree, rendered in a court, not of record, except where a transcript shall be filed, pursuant to section 3017 of this act, and also except a decree heretofore rendered in a surrogate's court of the state. The cause of action in such a case is deemed to have accrued when final judgment was rendered. (Co. Civ. Proc. § 382). The following actions and proceedings have been held to be within this section:

An action on a promise to pay for property, transferred by a sealed instrument, if the instrument contain

no covenant to pay. (*Coleman v. Second Ave. R. Co.*, 38 N. Y. 201). An action for accounting, where one purchased land, and held it under an agreement to sell, and account for part of the proceeds to another. (*Roup v. Bradner*, 19 Hun, 513). An action by a wife for the enticement of her husband. (*Hogan v. Wolf*, 32 St. Rep. 550; 10 Supp. 896; 26 Abb. N. C. 1). An action for damages for a breach of contract to convey lands. (*Bush v. Shaw*, 7 Wk. Dig. 539). An action against an attorney to recover damages for fraudulently procuring from the plaintiff, his client, a deed of real property, and the consequent destruction of plaintiff's title. (*Laufer v. Sayles*, 5 App. Div. 582). An action to enforce the liability of stockholders of a manufacturing corporation, because the capital stock is not paid in full. (*Phelps v. Therrasson*, 11 Hun, 141; *Knox v. Baldwin*, 80 N. Y. 610). An action against a stockholder for a debt of a corporation. (*Chase v. Lord*, 16 Hun, 369; rev'd on another point, 77 N. Y. 1; *Corning v. McCullough*, 1 N. Y. 47). An action against an officer of a corporation for misapplying the assets of the corporation. (*Pierson v. McCurdy*, 33 Hun, 520; 100 N. Y. 608). An action by a town to cancel municipal bonds. (*Town of Venice v. Breed*, 1 T. & C., 130; see, however, S. C. 68 N. Y. 462, 471-2). An action on an implied contract against a town with reference to the coupons attached to its bonds which have been improperly issued. (*Smith v. The Town of Greenwich*, 80 Hun, 118; aff'd. 145 N. Y. 649, 146 N. Y. 372). An action against a county for taxes appropriated by it, which should have been paid over for the benefit of the town, to establish a sinking fund to apply upon its bonds. (*Kilbourne v. Board of Supervisors*, 137 N. Y. 170). An action to enforce a devisee's lien on land. (*Borst v. Corey*, 15 N. Y. 505). An action by a husband to recover damages to his wife, caused by a nuisance maintained by the defendant, is within this section, and not within the three year limitation. (*Jorgensen v. Minister of Refd. Ch.* 7 Misc. 1). An action to recover money paid upon an illegal assessment is within the six years statute. (*Diefenthaler v. The Mayor*, 111 N. Y. 331; *Jex v. Mayor*, 111 N. Y. 339;

Trimmer v. Rochester, 134 N. Y. 76), and the statute begins to run against such an action, immediately upon the payment. (*Parsons v. The City of Rochester*, 43 Hun, 258). An action upon a legacy charged upon lands, where the devisee is personally liable, is within this section. (*Zweigle v. Hohman*, 75 Hun, 377). Subdivision 5 of this section does not apply solely to cases cognizable in a court of chancery, as was the case under the code of procedure. (*Foot v. Farrington*, 41 N. Y. 164). It covers all cases formerly cognizable in that court, whether its jurisdiction was exclusive or concurrent with that of courts of laws, in which any remedy or relief is sought for, aside from or in addition to, a mere money judgment, and which a court of law could not give, although as part of the relief sought, a money judgment is also demanded. (*Bosley v. N. M. Co.*, 123 N. Y. 550). An action to recover moneys from one who received them in his own right and who afterwards, by construction, becomes a trustee thereof, is within this section. (*Price v. Mulford*, 107 N. Y. 303). An action to recover a sum of money as damages, on the ground of fraud, is barred, if not brought within six years after the perpetration of the fraud. (*Miller v. Wood*, 116 N. Y. 351). A judgment creditor's action is within subdivision five of this section. (*Weaver v. Haviland*, 142 N. Y. 534; *Gates v. Andrews*, 37 N. Y. 657). An action to annul a marriage on the ground of fraud, is within this subdivision.. (*Montgomery v. Montgomery*, 3 Barb. Chan. 132). In actions under this section, the discovery of the facts constituting the fraud, is not necessarily the time of the accruing of the right of action, but the statute does not begin to run until the right of action is perfect, although the fraud may have been previously discovered. (*Weaver v. Haviland*, *supra*). The statute will begin to run from the time when the plaintiff has discovered sufficient facts to fairly arouse suspicion and to suggest the need of inquiry, although he does not know the facts constituting the fraud; he will be deemed at that time to have discovered them. (*Higgins v. Crouse*, 147 N. Y. 411). An

action by a ward against his guardian for an accounting for money received by the guardian, is not within this statute, and is not barred by the expiration of six years after the ward becomes of age. (*Matter of Camp*, 126 N. Y. 377). The case of *Van Der Zee* (73 Hun, 532), which holds to the contrary, is not the law. A proceeding to compel an executor or administrator to account before the surrogate must be commenced within six years after the right to compel the accounting accrued. (*Matter of Van Dyke*, 44 Hun, 394). A proceeding by an administrator *de bonis non*, as such, to compel the representative of his deceased predecessor to account in the surrogate's court is controlled by the ten year statute. (*Matter of Rogers*, 153 N. Y. 316). An action by the owner of a fee to remove a cloud upon the title to land by the cancellation of a mortgage thereon, is never barred by the statute of limitations. (*Schoener v. Lissauer*, 107 N. Y. 111; *Smith v. Reid*, 134 N. Y. 568). Although the plaintiff might have sued, either at law or in equity at his option, and he chooses to sue on the equity side of the court, yet if he might have had a remedy at law, the six years, and not the ten years statute, applies. (*Butler v. Johnson*, 111 N. Y. 204). A special proceeding to compel a municipality to pay for lands taken for public use is not barred in six years. The obligation to pay is created by the constitution and not by statute. (*Matter of Clark*, 148 N. Y. 1).

Where the statute is pleaded, the burden is on the plaintiff to show and excuse his failure to discover the facts constituting the fraud, but it is not necessary for him to allege those facts in his complaint. (*Erickson v. Quinn*, 3 Lans. 299; 47 N. Y. 410; see also, *Mason v. Heney*, 152 N. Y. 529). In an action for mesne profits, they can only be recovered for six years before the commencement of the action. (Co. Civ. Proc. § 1531). A widow recovering dower in property of which her husband died seized can recover damages for withholding her dower for not exceeding six years in the whole. (Co. Civ. Proc. § 1600).

Subdivision 3.—WITHIN FIVE YEARS.

An action to annul a marriage on the ground that one of the parties was physically incapable of entering into the marriage state, must be commenced before five years have expired since the marriage. (Co. Civ. Proc. § 1752). The period of limitation on this action was formerly two years, but was changed to five years in 1895. It was suggested in *Griffin v. Griffin* (23 How. Pr. 183), that if the period of limitation had passed without suit brought, this action could not be maintained, but in *Kaiser v. Kaiser* (16 Hun, 602), the court held that this was a statute of limitation, and that the lapse of time must be pleaded as it could not be relied upon for a defense. Davis, P. J., dissented. As the courts of this state have no jurisdiction to set aside a marriage except such as is given them by statute, it would seem that this portion of section 1752 was a limitation on their jurisdiction, and it is doubtful whether the case of *Kaiser v. Kaiser*, *supra*, is a correct statement of the law. The plaintiff is not entitled to a divorce in an action therefor, although the adultery is established, where there has been no express forgiveness, and no voluntary cohabitation of the parties, but the action was not commenced within five years after the discovery by the plaintiff of the offense charged. (Co. Civ. Proc. § 1758).

Subdivision 4.—WITHIN THREE YEARS.

The following actions must be brought within three years:

1. An action against a sheriff, coroner, constable, or other officer, for the non-payment of money collected upon an execution.

2. An action against a constable, upon any other liability incurred by him, by doing an act in his official capacity, or by the omission of an official duty; except an escape.

3. An action upon a statute, for a penalty or forfeitures where the action is given to the person aggrieved, or to that person and the people of the state; except where the statute imposing it prescribes a different limitation.

4. An action against an executor, administrator, or receiver, or against the trustee of an insolvent debtor, appointed, as prescribed by law, in a special proceeding instituted in a court or before a judge, brought to recover a chattel, or damages for taking, detaining, or injuring personal property, by the defendant, or the person whom he represents.

5. An action to recover damages for a personal injury, resulting from negligence. (Co. Civ. Proc. § 383). In applying this section it is immaterial whether the action is in form for contract or for a tort. Where the source of the injury is negligence, the action is barred if not begun in three years. (*Weber v. H. M. S. R. R. Co.*, 109 N. Y. 311). Applying this principle it has been held that an action for personal injuries, arising from the malpractice of a physician, must be brought within three years, and the fact that his services were rendered under a contract, does not change the period of limitation. (*Burrill v. Preston*, 54 Hun, 70). Within the three years limitation are included actions against a trustee of a corporation for neglecting to file the annual report, and also for declaring and paying dividends when the corporation is insolvent (*Merchants Bank of New Haven v. Bliss*, 35 N. Y. 412; *Losee v. Bullard*, 79 N. Y. 404; *Chapman v. Lynch*, 156 N. Y. 551); also actions against directors and stockholders of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or statute. (Co. Civ. Proc. § 394). An action against a sheriff by a purchaser at execution sale, which was set aside for irregularity, to recover back the money paid is within this section (*Browne v. O'Brien*, 5 Daly, 474); so is a motion to determine the surplus on an execution sale, and to compel the payment to the defendant. (*Frankel v. Elias*, 60 How. Pr. 74). An action against a stakeholder, to recover a wager, under the statute of betting and gaming, must be brought within three years (*Fowler v. Van Surdam*, 1 Den. 557); so of an action to recover double the sum paid for lottery tickets, with double costs. (*Grover v. Morris*, 73 N. Y. 473). This section applies to an action against a municipal corpora-

tion for failure to keep streets in repair. (*Dickinson v. Mayor*, 92 N. Y. 584). An action by a husband to recover damages for an injury to his wife, through the defendant's negligence, is barred by this statute. (*Marson v. D. L. & W. R. R. Co.*, 112 N. Y. 559). The case of *Groth v. Washburn* (34 Hun, 509), laying down a different rule, has been overruled.

Subdivision 5.—WITHIN TWO YEARS.

The following actions must be brought within two years after the cause of action has accrued :

1. An action to recover damages for libel, slander, assault, battery, seduction, criminal conversation, false imprisonment, malicious prosecution, or malpractice.

2. An action upon a statute, for a forfeiture or penalty to the people of the state. (Co. Civ. Proc. § 384). An action against a master for assault and battery committed by his servant is within this section. (*Priest v. H. R. R. Co.*, 10 Abb. Pr. N. S. 60; 40 How. Pr. 456). An action for causing death by negligence must be brought within two years. (Co. Civ. Proc. § 1902). The legality of a grant to trustees for the creation of a public library, museum, or other educational institution cannot be questioned unless the suit, in which such question is raised, is begun within two years after the date of filing such grant for record. (3 R. S. 9 Ed. 2871, § 7). A two year limitation is also imposed on the personal liability of stockholders for the debts of a corporation. (2 R. S. 9 Ed. 1026, § 55). An action by a person who has become a stockholder or a creditor of a corporation upon the faith of a false certificate, report, or public notice, made or given by the officers or directors of that corporation, against the officers or directors signing the same, must be begun within two years from the time the certificate, report or public notice was made or given. (2 R. S. 9 Ed. 1014-5, § 31). An action to recover damages by reason of the erection in any city of an exterior wall, partly upon a strip of land not exceeding six inches and partly upon the adjoining lot, where a building has been erected upon land of the plaintiff abutting on the said wall, must be brought within two years after the

completion of the erection of such wall. (Co. Civ. Proc. § 1499).

Subdivision 6.—WITHIN ONE YEAR.

The following actions must be brought within one year after the cause of action has accrued :

1. An action against a sheriff or coroner, upon a liability incurred by him, by doing an act in his official capacity, or by the omission of an official duty; except the non-payment of money collected upon an execution.

2. An action against any other officer, for the escape of a prisoner, arrested or imprisoned by virtue of a civil mandate. (Co. Civ. Proc. § 385). An action against a sheriff for seizing, or selling upon his process the property of one person under an execution or attachment against another, is within this section. (*Dennison v. Plumb*, 18 Barb. 89; *Cumming v. Brown*, 43 N. Y. 514). The case of *Morris v. Van Voast* (19 Wend. 283), holding to the contrary, is overruled. So, an action against a sheriff for neglect to return an execution is within this statute. (*Peck v. Hulburt*, 46 Barb. 559). The section is not applicable to an action against a sheriff for procuring payment, by means of a sworn bill and false vouchers, for board of fictitious persons, never confined in jail. (*Board of Supervisors v. Walter*, 4 Hun, 87). An action to recover animals seized as strays on the highway, or for damages for their seizure, must be brought within one year. (Co. Civ. Proc. § 3107). An action by a borrower who has paid usury, to recover back the excess of interest, must be brought within one year. (2 R. S. 9 Ed. 1855, § 3). Actions against directors of membership corporations, for a debt or liability of the corporation, must be brought within one year after an execution against the corporation is returned unsatisfied. (2 R. S. 9 Ed. 1438, § 11). An action upon a statute for a penalty or forfeiture, given wholly or partly to any person who will prosecute for the same, must be commenced within one year after the commission of the offense; and if the action is not commenced within the year by a private person, it may be commenced within two years thereafter, in behalf of the people of the state, by the attorney general, or the district attorney of the

county where the offense was committed. (Co. Civ. Proc. § 387). An action against a city of the state, having 50,000 inhabitants or over, for damages for personal injuries alleged to have been sustained by reason of the negligence of an agent or employe of the city, must be begun within one year after the cause of action accrued. (3 R. S. 9 Ed. 2686). An action against a railroad corporation to recover the penalty for charging an excessive fare must be begun within one year after the cause of action accrued. (2 R. S. 9 Ed. 1274-5, § 39). An action to recover real property, or the possession thereof, cannot be maintained, where in any city the real property consists of a strip of land not exceeding six inches in width upon which there stands the exterior wall of a building erected partly upon said strip and partly upon the adjoining lot, and a building has been erected upon land of the plaintiff abutting on the said wall, unless said action be commenced within one year after the completion of the erection of such wall. (Co. Civ. Proc. § 1499).

Subdivision 7.—WITHIN TEN YEARS.

An action, the limitation of which is not especially prescribed in one of the preceding sections of the code of civil procedure, must be commenced within ten years after the cause of action accrues. (Co. Civ. Proc. § 388). This section applies to all actions exclusively of equity jurisdiction, in which there is no concurrent remedy at law. (*Zweigle v. Hohman*, 75 Hun, 377; *Gallup v. Bernd*, 132 N. Y. 370). It includes all actions in equity, except such as are within subdivision five of section 382. (*Salisbury v. Morss*, 7 Lans. 359; 55 N. Y. 675; *Hoyt v. Tuthill*, 33 Hun, 196). The fact that the plaintiff has elected to seek equitable relief, does not extend the statute if he has a remedy at law. (*Hann v. Culver*, 73 Hun, 109). The following actions are included within section 388: Actions for separation (*Burr v. Burr*, 10 Paige, 20); by the creditors of a corporation to reach assets withheld by the stockholders (*Christensen v. Eno*, 21 Wk. Dig. 202); to establish a resulting trust (*Higgins v. Higgins*, 14 Abb. N. C. 13); to adjust the affairs of a partnership (*Still v. Holbrook*, 23 Hun, 517; *Campbell*

v. *Hughes*, 73 Hun, 14); an action by one who has subscribed to a joint enterprise to call the trustee to account (*Rodman v. Devlin*, 23 Hun, 590); by the *cestui que trust* against a trustee who has purchased the trust premises on his own account (*Ward v. Smith*, 3 Sand. Ch. 592; *Hubbell v. Medbury*, 53 N. Y. 98); an action to charge lands in the hands of a devisee with debts, if the devisees are not personally liable, is within this statute. (*Wood v. Wood*, 26 Barb. 356; *Mortimer v. Chambers*, 63 Hun, 335). Where the equitable owner of land is evicted by one owning legal title, the ten years statute applies to an action to obtain possession. (*Varick v. Edwards*, 11 Paige, 289; *Bartlett v. Judd*, 20 N. Y. 200, at 205). Where one has purchased the demands of a bank against the cashier, an action against the cashier to compel an accounting and payment, is within this section of the statute. (*Mann v. Fairchild*, 14 Barb. 548). Actions for the specific performance of a contract (*Peters v. Delaplaine*, 49 N. Y. 362; *Bruce v. Tilson*, 25 N. Y. 194); and to reform a contract on the ground of a mistake or inadvertence (*Oakes v. Howell*, 27 How. Pr. 145; *Hoyt v. Putnam*, 39 Hun, 402); are barred by the ten years statute. An action against a vendor for a specific performance of a contract to sell land in possession of the purchaser, accrues upon the payment of the purchase price. (*Kelly v. Potter*, 16 Supp. 446). An action to redeem a pledge is within this section of the statute (*Roberts v. Sykes*, 30 Barb. 133); also an action by a trustee for relief against the estate of a *cestui que trust*, for money expended for the benefit of the estate. (*Brandon v. Brandon*, 50 How. Pr. 328; 4 T. & C. 385). A proceeding to vacate an assessment in the city of New York is barred in ten years. (*Matter of Striker*, 23 Hun, 647). An action by the people of the state, founded upon the spoliation or misappropriation of public property, is barred in ten years. (Co. Civ. Proc. § 1972).

Subdivision 8.—ACTIONS BY THE PEOPLE.

The limitations, prescribed in the code of civil procedure, apply alike to actions brought in the name of the people of the state, or for their benefit, and to actions

by private persons. (Co. Civ. Proc. § 389). Neither the legislature nor any person or persons acting in behalf of the state, shall audit, allow or pay any claim, which as between citizens of the state, would be barred by lapse of time, but if the claimant be under legal disability, the claim may be presented within two years after the disability is removed. (Con. Art. 7, § 6). Presentment of a claim to the legislature, or to any body of officers having jurisdiction to pay, allow, or act upon it, followed by an appropriation by the legislature of money to pay the claim, although the state officers refuse to pay after such appropriation, is sufficient to prevent the statute of limitations running in favor of the state if the claim is prosecuted with reasonable diligence thereafter. (*Corkings v. The State*, 99 N. Y. 491).

Sec. 3. Non-Residence or Absence from the State.

Where a cause of action, which does not involve the title to or possession of real property within the state, accrues against a person, who is not then a resident of the state, an action cannot be brought thereon in a court of the state, against him or his personal representatives, after the expiration of the time, limited, by the laws of his residence, for bringing a like action, except by a resident of the state, and in one of the following cases:

1. Where the cause of action originally accrued in favor of a resident of the state.

2. Where, before the expiration of the time so limited, the person, in whose favor it originally accrued, was or became a resident of the state; or the cause of action was assigned to, and thereafter continuously owned by, a resident of the state. (Co. Civ. Proc. § 390). This section changes the rule laid down in *Miller v. Brenham* (7 Hun, 330; 68 N. Y. 83) and the other cases, which held that the statute of limitations of another state, can never be a bar to an action in this state (see *Tioga R. R. Co. v. B. & C. R. R. Co.*, 20 Wal. 137; *Olcott v. Tioga R. R. Co.*, 20 N. Y. 214; *Power v. Hathaway*, 43 Barb. 214); but a non-resident corporation cannot plead the statute of limitations peculiar to section 1902. (*Longdriggan v. N. Y. & N. H. R. R. Co.*, 12 Abb. N. C. 273).

If, when the cause of action accrues against a person he is without the state, the action may be commenced within the time limited therefor, after his return into the state. If, after a cause of action has accrued against the person, he departs from the state and remains continuously absent therefrom for the space of one year or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time limited for the commencement of the action. But this section does not apply while a designation made as prescribed in section 430 or in subdivision 2 of section 432 of this act remains in force. (Co. Civ. Proc. § 401). It is also provided that nothing in this section contained shall revive any cause of action barred by the statutes as it existed prior to the passage of this act (Id.). This section applies to non-residents as well as citizens of the state. (*Mayer v. Friedman*, 7 Hun, 218; 69 N. Y. 608). To set the statute running, the defendant's return to the state must be open and notorious, so that the plaintiff either knew of it, or could have known of it with reasonable diligence. (*Palmer v. Bennett*, 83 Hun, 220; 152 N. Y. 621). This section (401) formerly read "departs from, and *resides without*, the state," and it was held that a *residence* without the state must be proven to bring the case within the section. (*Hart v. Kip*, 148 N. Y. 306). The provision requiring residence without the state was stricken out in 1896. (Chap. 665, L. 1896). The statute of limitations does not run in favor of a non-resident of the state, against a resident. (*Ruggles v. Keeler*, 3 Johns. 263). A foreign corporation is a person out of the state within section 401, although it has property and a managing agent within the state. (*Rathbun v. N. C. R. R. Co.*, 50 N. Y. 656; *Olcott v. Tioga R. R. Co.*, 20 N. Y. 210; *Boardman v. Lake Shore Michigan Southern R. R. Co.*, 84 N. Y. 157), and such a corporation cannot avail itself of the statute of limitations in the courts of this state. (*Robeson v. Central R. R. of N. J.*, 76 Hun, 444). The period during which a mortgagor of real property is

absent from the state is not a part of the time limited for beginning an action to foreclose a mortgage, despite the fact that such an action may be begun by publishing the summons. (*Simonson v. Nobis*, 36 App. Div. 473). The absence of a joint, or joint and several debtor from the state, suspends the running of the statute against him, although the others liable with him have remained in the state (*Bogert v. Vermilya*, 10 N. Y. 447; *Denny v. Smith*, 18 N. Y. 567). *Brown v. Delafield* (1 Denio, 445), is overruled by the case last cited. If the debtor is within the state when the cause of action accrues, the time is not extended by various absences each less than one year. (*Hickok v. Bliss*, 34 Barb. 321; *Ulnor v. Butterfield*, 49 Super. 515). It is to be noted that, formerly, the provision requiring *continuous* absence from the state for the space of one year or more was not incorporated in the statute; it was held, accordingly, that the statute did not run, at least continuously, in favor of one living out of the state although he did business in the state (*Bennett v. Cook*, 43 N. Y. 537); under the section in its present form, there must be a *continuous* absence for a year or more to prevent the statute running. (*Costello v. Downer*, 19 App. Div. 434; *Conn. Tr. Co. v. Wead*, 58 App. Div. 493). Where a person is disabled to sue in the courts of the state, by reason of either party being an alien subject, or citizen of a country at war with the United States, the time of the continuance of the disability is not a part of the time limited for the commencement of the action. (Co. Civ. Proc. § 404).

Sec. 4. What Prevents the Running of the Statute.

If a person, against whom a cause of action exists, dies without the state, the time which elapses between his death, and the expiration of eighteen months after the issuing, within the state, of letters testamentary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator. (Co. Civ. Proc. § 391). For an application of this section, see *Merritt v. Carpenter*, (12 Wk. Dig. 233). For the purpose of computing the time, within which an action must be commenced

in a court of the state, by an executor or administrator, to recover personal property, taken after the death of a testator or intestate, and before the issuing of letters testamentary or letters of administration; or to recover damages for taking, detaining, or injuring personal property within the same period; the letters are deemed to have been issued, within six years after the death of the testator or intestate. But where an action is barred by this section, any of the next of kin, legatees, or creditors, who, at the time of the transaction upon which it might have been founded, was within the age of twenty-one years, or insane, or imprisoned on a criminal charge, may, within five years after the cessation of such a disability, maintain an action to recover damages by reason thereof; in which he may recover such sum, or the value of such property, as he would have received upon the final distribution of the estate, if an action had been seasonably commenced by the executor or administrator. (Co. Civ. Proc. § 392). The provisions of this section refer to actions to recover tangible personal property, taken after the death of a testator or intestate, and not to actions by personal representatives for an accounting by surviving partners. (*Cohen v. Hymes*, 64 Hun, 54). If a person, entitled to maintain an action, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representative, after the expiration of that time, and within one year after his death. (Co. Civ. Proc. § 402). The term of eighteen months after the death, within the state, of a person against whom a cause of action exists, or of a person who shall have died within sixty days after an attempt shall have been made to commence an action against him pursuant to the provision of section 399 of the code of civil procedure, is not a part of the time limited for the commencement of an action against his executor or administrator. If letters testamentary or letters of administration upon his estate are not issued within the state, at least six months before the expiration of the time to bring the action, as extended by the foregoing provision of this section, the term of one year after such

letters are issued is not a part of the time limited for the commencement of such an action. *** (Co. Civ. Proc. § 403). The extension of one year does not apply if the letters are not issued until after the claim is barred. (*Chapman v. Fonda*, 24 Hun, 130). This section (403) does not apply to section 376 which provides that a judgment shall be conclusively presumed to be paid after twenty years from the time the party recovering it was entitled to a mandate to enforce it, etc. (*Matter of Kendrick*, 107 N. Y. 104). It seems that the extension of eighteen months mentioned in section 403 applies only to those sections following 380 which limit the time for commencing certain actions. (Id.). The time during which an action is pending in a court of record between a person or persons and an executor or administrator, wherein the person or persons claim to recover from the executor or administrator any money or property claimed by the said executor or administrator to belong to the estate of the decedent, as [*sic*] is embraced in the inventory of the assets of said decedent's estate, is not a part of the time limited for the commencement of an action against the executor or administrator, for a claim against the estate of the said decedent until the final determination of the action brought to recover said or other property claimed by said executor or administrator to belong to said decedent's estate:

1. Where the claim against the estate of the decedent is liquidated by the recovery of a judgment thereon against an executor or administrator in an action in a court of record or under section 2718 of this code, after trial on the merits.

2. Where a legatee brings an action, or institutes a proceeding, against an executor or administrator with the will annexed, to enforce the payment of a legacy. (Co. Civ. Proc. § 403). If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits; the plaintiff, or, if he dies, and the

cause of action survives, his representative, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination. (Co. Civ. Proc. § 405). This section does not apply to actions which are authorized by the special statutes which prescribe the particular period of limitation for them. (Co. Civ. Proc. § 414; *Hill v. Supervisors*, 119 N. Y. 344). Nor does it apply to a case in which the first action was brought elsewhere than in a court of record of the state of New York. (*Solomon v. Bennett*, 62 App. Div. 36). Where a case has been partly tried and a non suit granted, that is not a dismissal of the plaintiff for neglect to prosecute, within the meaning of this section. (*Marx v. Man. Ry. Co.*, 24 Abb. N. C. 62; 10 Supp. 222). Where judgment has been reversed under this section, the plaintiff has one year after final judgment of the court of appeals to bring his action. (*Wooster v. The Forty-Second St. R. R. Co.*, 71 N. Y. 471). This section applies to special proceedings (Co. Civ. Proc. § 414), and the petitioner is considered as the "plaintiff." (*Matter of Schlesinger*, 36 App. Div. 77). Where the commencement of an action has been stayed by injunction, or other order of a court or judge, or by statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action. (Co. Civ. Proc. § 406). The provisions of this section apply to the six months limitation for a rejected claim under section 1822 of the code of civil procedure. (*Wilder v. Ballou*, 63 Hun, 118; *Hayden v. Pierce*, 144 N. Y. 512). It is not necessary that the injunction should be served: if it is brought to the notice of the plaintiff so as to become in force against him, that is sufficient. (*Berrien v. Wright*, 26 Barb. 208). The time during which a creditor is prevented from suing a bankrupt, under the federal bankruptcy law, is not to be counted as a part of the time limited for the commencement of an action. (*Von Sachs v. Kietz*, 10 Hun, 95; *affd.* 72 N. Y. 548). It seems to have been held, formerly, that this section did not apply where a limitation was contained in the contract sued on (*Wilkinson v. First Nat. Fire Ins. Co.*, 9 Hun,

522; 72 N. Y. 499), but this may be doubted now in the light of a recent decision of the court of appeals (*Hamilton v. Royal Ins. Co.*, 156 N. Y. 327), holding section 399 applicable to such limitations. Where a city charter prohibits a plaintiff from bringing suit until thirty days after the presentation of his claim, the running of the statute is suspended during those thirty days. (*Brehm v. Mayor*, 104 N. Y. 186). For another instance of "statutory prohibition" see *Adams v. Fossett*, (149 N. Y. 61). Where the persons, who might be adverse parties in an action, have entered into a written agreement to submit to arbitration, or to refer the cause of action, or a controversy in which it might be available, or have entered into a written submission thereof to arbitrators; and before an award, or other determination thereupon, the agreement or submission is revoked, so as to render it ineffectual, by the death of either party thereto, or by the act of the person against whom the action might have been brought; or the execution thereof, or the remedy upon an award, or other determination thereunder, is stayed by injunction, or other order procured by him from a competent court or judge; the time which has elapsed, between the entering into the written submission or agreement, and the revocation thereof, or the expiration of the stay, is not a part of the time, limited for the commencement of the action. (Co. Civ. Proc. § 411). Where a defendant in an action has interposed an answer, in support of which he would be entitled to rely, at the trial, upon a defense or counter-claim then existing in his favor, the remedy upon which, at the time of the commencement of the action, was not barred by the provisions of this chapter; and the complaint is dismissed, or the action is discontinued, or abates in consequence of the plaintiff's death; the time which intervened, between the commencement and the termination of the action, is not a part of the time, limited for the commencement of an action by the defendant, to recover for the cause of action so interposed as a defense, or to interpose the same defense in another action brought by the same plaintiff, or a person deriving title from or under him. (Co. Civ. Proc. § 412). If a person,

entitled to maintain an action specified in this title, except for a penalty of forfeiture, or against a sheriff or other officer for an escape, is, at the time when the cause of action occurs, either:

1. Within the age of twenty-one years; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life; the time of such disability is not a part of the time, limited in this title for commencing the action; except that the time so limited cannot be extended more than five years by any such disability, except infancy; or, in any case, more than one year after the disability ceases. (Co. Civ. Proc. § 396). A person cannot avail himself of a disability unless it existed when his right of action or of entry accrued. (Co. Civ. Proc. § 408). Where two or more disabilities co-exist, when the right of action or of entry accrues, the limitation does not attach, until all are removed. (Co. Civ. Proc. § 409). If a widow is at the time of the death of her husband, laboring under any of the disabilities mentioned in section 396, the time of such disability is not part of the time limited for the commencement of an action for her dower. And if at any time, before her claim of dower has been barred by a lapse of twenty years, the owner of the land subject to it, being in possession, shall have recognized her claim of dower by any statement contained in a writing under seal, subscribed and acknowledged in the manner entitling a deed of real estate to be recorded, or if by any judgment or decree of a court of record, within the same time, and concerning the lands in question, wherein such owner or owners were parties, such right of dower shall have been distinctly recognized as a subsisting claim against said lands, the time after the death of her husband, and previous to such acknowledgment in writing or such recognition by judgment or decree, is not part of the time limited for the commencement of the action for her dower. (Co. Civ. Proc. § 1596).

Sec. 5. What Actions are not Within the Statute.

Actions to enforce the payment of a bill, note, or other evidence of debt, issued by a moneyed corporation, or issued or put in circulation as money, are not within the statute of limitations. (Co. Civ. Proc. § 393). The statute of limitations has no application to proceedings in an action which has once been commenced and is pending. (*Hawley v. Whalen*, 64 Hun, 550).

Sec. 6. Mode of Computing Time.

The periods of limitation, prescribed by this chapter, except as otherwise specially prescribed therein, must be computed from the time of the accruing of the right to relief by action, special proceeding, defense, or otherwise, as the case requires, to the time when the claim to that relief is actually interposed by the party, as a plaintiff or a defendant, in the particular action or special proceeding. (Co. Civ. Proc. § 415). It was held in *Hall v. Brennan*, (140 N. Y. 409), that the term "year" as used before the statutory construction act took effect, is taken to consist of 365 days, for all purposes of application to the statute of limitations. But the statutory construction act (sec. 25), defines the meaning of the term "year" when used in the statute, to be twelve months. In an action brought to recover a balance upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side. (Co. Civ. Proc. § 386). An account containing items of the moneys received and paid by one party, and contained only in his books, is not a mutual, open and current account, within this section. (*Adams v. Olin*, 140 N. Y. 150). Where an injury results from the act or omission of a deputy or agent, the time, within which an action to recover damages by reason thereof, must be commenced by the principal, against the deputy or agent, must be computed from the time, when a judgment against the principal, for the act or omission, is first recovered by the aggrieved person; and a subsequent

reversal or setting aside of the judgment does not extend the time. (Co. Civ. Proc. § 407). Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time, within which the action must be commenced, must be computed from the time when the right to make the demand is complete; except in one of the following cases:

1. Where the right grows out of the receipt or detention of money or property, by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time, when the person, having the right to make the demand, has actual knowledge of the facts, upon which that right depends.

2. Where there was a deposit of money, not to be repaid at a fixed time, but only upon a special demand, or a delivery of personal property, not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand. (Co. Civ. Proc. § 410). The second subdivision of this section only applies where there was some special agreement or understanding as to the repayment of the money deposited, or the return of the property delivered. In the absence of such an agreement, the lapse of six years from the receipt of the property, bars the claim. (*Adams v. Olin*, 140 N. Y. 150). A promissory note payable on demand is barred in six years from its date, whether it bears interest or not. (*Wheeler v. Warner*, 47 N. Y. 519; *Mills v. Davis*, 113 N. Y. 243). As against the endorser of such a note the statute runs from demand and protest (*Parker v. Stroud*, 98 N. Y. 379), but as against the endorser of a non-negotiable note payable on demand, the statute begins to run from its date. (*McMullen v. Rafferty*, 89 N. Y. 456). Where a deposit is made with a bank, or with any other depository, the cause of action does not accrue until a demand. (*Boughton v. Flint*, 74 N. Y. 476; *Howell v. Adams*, 68 N. Y. 314; *Smiley v. Fry*, 100 N. Y. 262). Money deposited by a contractor as security for performance of his contract, to be returned on the complete performance, is not within subdivision 2 of section 410. (*Corkings v. The State*, 99 N. Y. 491). Where one is indebted to a

married woman, and executes an instrument, acknowledging the debt and agreeing to pay interest, stating that it was agreed that the sum should remain in his hands in trust for her, that debt is not within that subdivision. (*Matter of Neilly*, 95 N. Y. 382). The statute of limitations begins to run, against the drawee of a check from the time of presentation and refusal. (*Viets v. Union Nat. Bank*, 101 N. Y. 563). If the drawer has no funds in the bank to meet the check, the statute begins to run against him at its date. (*Brush v. Barrett*, 82 N. Y. 400). The statute does not run in favor of a trustee, as against the *cestui que trust*, until open denial or repudiation of the trust, or notice of an adverse claim. (*Purdy v. Sistare*, 2 Hun, 126; *Skidmore v. Post*, 20 Wk. Dig. 349; *Hubbell v. Medbury*, 53 N. Y. 98). This rule, however, applies only to the trustee of an actual, expressed and subsisting trust (*Lammer v. Stoddard*, 103 N. Y. 672), and not where the trustee becomes such by implication or construction. In such a case the statute begins to run from the date of the wrong which raises the implication. (*Gilmore v. Ham*, 142 N. Y. 10). In an action by a surety, or an endorser, against a principal, the statute begins to run from the time of payment. (*Rodman v. Hedden*, 10 Wend. 498; *Elwood v. Deifendorf*, 5 Barb. 398; *Barker v. Cassidy*, 16 Barb. 177). The statute begins to run, against an attorney on his claim for services, when the relation is terminated, and not before (*Mygatt v. Wilcox*, 45 N. Y. 306; *Bathgate v. Haskins*, 59 N. Y. 533); although the cause of action has been assigned. (*Gastine v. Stoddard*, 23 Hun, 99). Where an attorney has collected money for a client, the cause of action against him for the money, begins to run as soon as the client has knowledge of the collection. (*Wood v. Young*, 141 N. Y. 211). It does not run in favor of a factor or commission merchant, until demand. (*Baird v. Walker*, 12 Barb. 298; *Halden v. Craft*, 4 E. D. Smith, 490). In an action for conversion, the statute runs from the time of the conversion, and not from a demand and refusal, unless a demand is necessary to make a cause of action for conversion. (*Kelsey v. Griswold*, 6 Barb. 436; *Roberts v. Berdell*, 15 Abb. Pr. N. S.

177). In an action for false imprisonment, the statute begins to run from the termination of the actual imprisonment, although an appeal to review the order discharging the plaintiff from his imprisonment, is pending. (*Dusenbury v. Keiley*, 85 N. Y. 383; *Van Ingen v. Snyder*, 24 Hun, 81). In an action for any tort, the statute begins to run when the tort is committed. (*Northrop v. Hill*, 57 N. Y. 351; *Allen v. Mille*, 17 Wend. 202). A fraudulent concealment of the cause of action by the defendant does not take the cause out of the statute (*Leonard v. Pitney*, 5 Wend. 30; *Allen v. Mille*, *supra*); except as to actions within sub-division 5 of section 382. An action against a director, for failure to make a report under section 12 of the manufacturing corporation act, begins to run when the first failure occurs, and a subsequent failure to make a report does not extend the time. (*Losce v. Bullard*, 79 N. Y. 404).

Sec. 7. Defense and Counter-claim.

A cause of action, upon which an action cannot be maintained, because the statute of limitations runs against it, cannot be effectually interposed as a defense or counter-claim. (Co. Civ. Proc. § 397).

Sec. 8. What Takes a Case out of the Statute.

An acknowledgment or promise, contained in a writing signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract, whereby to take a case out of the operation of this title. But this section does not alter the effect of a payment of principal or interest. (Co. Civ. Proc. § 395). If the maker admits the note, but says it was outlawed, and that he would rely on the statute, that is not sufficient evidence of a new promise to pay within six years. (*Danforth v. Culver*, 11 Johns. 145). An offer to compromise a suit, if it is rejected, or to arbitrate, coupled with a statement that the plaintiff had no claim, does not take the cause out of the statute. (*Lawrence v. Hopkins*, 13 Johns. 287; *Sands v. Gelston*, 15 Johns. 511). In order to take a case out of the statute, there must be an express promise, or an acknowledgment of a present debt, a subsisting liability, and willingness to

pay. (*Allen v. Webster*, 15 Wend. 284; *Loomis v. Decker*, 1 Daly, 186; *Bloodgood v. Bruen*, 8 N. Y. 362; *Winchell v. Hicks*, 18 N. Y. 558; *Crandall v. Moston*, 42 App. Div. 629; *Fletcher v. Daniels*, 52 App. Div. 67). The writing is not sufficient if it shows that there is no intention on the part of the debtor to pay the debt. (*Manchester v. Braedner*, 107 N. Y. 346; *Davis v. Noyes*, 39 St. Rep. 632; 15 Supp. 431). The writing need not express an intention to pay, as that will be presumed (*McNamee v. Tenny*, 41 Barb. 495), if the acknowledgment contains an unqualified and direct admission of a debt upon which the party is liable, and which he is willing to pay (*Stafford v. Bryan*, 3 Wend. 532); and it must be in such a form that the law would imply a promise to pay. (*Stoker v. Watters*, 12 Wk. Dig. 321). An acknowledgment, made to a stranger, not intended to be communicated to the creditor, is not sufficient to take the debt out of the statute (*Smith v. Camp*, 58 Hun, 434; *Matter of Kendrick*, 107 N. Y. 105); if made to the stranger with the intention that it shall be communicated to, and influence, the creditor, it defeats the statute. (*DeFreest v. Warner*, 98 N. Y. 217). But where the testator, by his will, directs the payment of a specific debt, this is a sufficient acknowledgment of the debt to take it out of the statute, although a general direction for the payment of debts, would not have that effect. (*Gilbert v. Morrison*, 53 Hun, 442). If the promise was conditional, the condition must be shown to have been complied with. (*Wakeman v. Sherman*, 9 N. Y. 85; *Tebo v. Robinson*, 100 N. Y. 27). The date of the acknowledgment, or the time when it was made, may be shown by parol. (*Kincaid v. Archibald*, 73 N. Y. 189). The amount of the debt need not be mentioned in the new promise. (*Fiske v. Hibbard*, 45 N. Y. Super. 331). Where an executor included, in his inventory of the estate a note which he gave to the testator, it was held a sufficient acknowledgment. (*Ross v. Ross*, 6 Hun, 80; *Morrow v. Morrow*, 12 Hun, 386; *Clark v. Van Amburgh*, 14 Hun, 557). An executor cannot revive a debt against his testator by an acknowledgment, or by a partial payment, but only by an express promise, if at all. (*Blood-*

good v. Bruen, 8 N. Y. 362; *McLaren v. McMartin*, 36 N. Y. 88). An acknowledgment of a tort will not take it out of the statute. (*Oothout v. Thompson*, 20 Johns. 277). A delivery by a debtor to a creditor, of a note of a third person as security, is a sufficient acknowledgment of a debt to take it out of the statute. (*Smith v. Ryan*, 66 N. Y. 352). An appropriation by the legislature of moneys to pay a claim is a sufficient acknowledgment. (*Corkings v. State*, 99 N. Y. 491). A stipulation to waive the statute on a hearing before an arbitrator takes the case out of the statute. (*Anderson v. Sibley*, 28 Hun, 16). Commencement of proceedings to foreclose a mortgage by advertisement, operates as an acknowledgment of the obligor's right to redeem. (*Calkins v. Isbell*, 20 N. Y. 147). A partial payment is evidence from which an acknowledgment of the residue of the debt may be implied *McLaren v. Martin*, 36 N. Y. 88), and such implied acknowledgment revives the debt as effectually as one in writing. (*Gardner v. Gardner*, 19 Wk. Dig. 249; *First Nat. Bank of Utica v. Ballou*, 49 N. Y. 155). But the payment, to take the case out of the statute, must be made upon the particular debt, and be accepted by the creditor as such, and accompanied by circumstances, amounting to an absolute and unqualified acknowledgment by the debtor that more was due, so that a promise to pay the remainder, may be inferred. (*Crow v. Gleason*, 141 N. Y. 489; *Adams v. Olin*, 140 N. Y. 150). A payment intended as a full discharge of a claim, can not be made available as a part payment, to take the claim out of the statute. (*Compton v. Bowns*, 5 Misc. 213). But a partial payment by one maker, will not prevent the running of the statute against the other (*Littlefield v. Littlefield*, 91 N. Y. 203; *Murdock v. Waterman*, 145 N. Y. 55); although it was made before the statute accrued (*Dunham v. Dodge*, 10 Barb. 566; *Shoemaker v. Benedict*, 11 N. Y. 176); unless the payer is the agent of the other debtor, or the payment is subsequently ratified by him. (*McMullen v. Rafferty*, 89 N. Y. 456). Payment by the principal debtor does not charge the surety unless it is authorized by the surety. (*Littlefield v. Littlefield*, *supra*; *Haight v. Avery*, 16

Hun, 252). A partial payment by one partner, removes the bar against the firm, although after the dissolution of the firm, if the payee was ignorant of the fact of the dissolution. (*Forbes v. Garfield*, 32 Hun, 389). But a partial payment by the assignee for the benefit of creditors, will not take the debt out of the statute, as against the assignor. (*Pickett v. Leonard*, 34 N. Y. 175). An endorsement of interest, by a deceased owner of a note, before the note is outlawed, is evidence of partial payment sufficient to take the note out of the statute (*Risley v. Wightman*, 13 Hun, 163); but there is no presumption that an endorsement, in the handwriting of the payee, on the note, of a partial payment thereon, was made on the day that it bears date. (*Purdy v. Purdy*, 47 App. Div. 94). The acknowledgment must be made to the creditor or some one acting in his interest. (*Winterton v. Winterton*, 7 Hun, 230; *Wakeman v. Sherman*, 9 N. Y. 85; *Bloodgood v. Bruen*, 8 N. Y. 362). A new promise to a holder of a note, enures to the benefit of a subsequent holder. (*Dean v. Hewitt*, 5 Wend. 257). A promise to an attorney who has a note for collection is sufficient. (*Pinkerton v. Bailey*, 8 Wend. 600).

Sec. 9. How Objection Taken.

The objection, that the action was not commenced within the time limited, can be taken only by answer. The corresponding objection to a defense or counter-claim can be taken only by reply, except where a reply is not required, in order to enable the plaintiff to raise an issue of fact, upon an allegation contained in the answer. (Co. Civ. Proc. § 413). The statute must be pleaded in respect to a counter-claim. (*Williams v. Willis*, 15 Abb. N. S. 11; *Clinton v. Eddy*, 1 Lans. 61). A general allegation in an answer, that defendant claims the benefit of the statute, is not good; it should be pleaded that the cause of action did not accrue within the specified period. (*Budd v. Walker*, 29 Hun, 344). The objection that a *certiorari* to review, has not been granted within the four months allowed by section 2125 of the code of civil procedure, must be taken by a motion to dismiss. (*Peo. ex rel McNeary v. MacLean*, 64 Hun, 205).

Sec. 10. Cases not Within the General Statute.

The provisions of this chapter apply, and constitute the only rules of limitation applicable, to a civil action or special proceeding, except in one of the following cases:

1. A case, where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties.

2. A cause of action or a defense which accrued before the first day of July, 1848. The statutes then in force govern, with respect to such a cause of action or defense.

3. A case not included in the last sub-division, in which a person is entitled, when this act takes effect, to commence an action, or to institute a special proceeding, or to take any proceeding therein, or to pursue a remedy upon a judgment, where he commences, institutes, or otherwise resorts to the same, before the expiration of two years after this act takes effect; in either of which cases, the provisions of law applicable thereto, immediately, before this act takes effect, continue to be so applicable, notwithstanding the repeal thereof.

4. A case, where the time to commence an action has expired, when this act takes effect.

The word "action," contained in this chapter, is to be construed, when it is necessary so to do, as including a special proceeding, or any proceeding therein, or in an action. (Co. Civ. Proc. § 414). The words "rules of limitation," as used in this section, refer, not to all subjects dealt with in the chapter of the code of procedure upon the statute of limitations, but only to those provisions of that chapter fixing periods of time within which the various classes of actions specified therein are to be brought. (*Hayden v. Pierce*, 144 N. Y. 512; *Titus v. Poole*, 145 N. Y. 414; *Hamilton v. Royal Ins. Co.*, 156 N. Y. 327).

Sec. 11. When Action Deemed Begun.

An action is commenced against a defendant, within the meaning of any provision of this act, which limits the time for commencing an action, when the summons is served on him; or on a co-defendant who is a joint

contractor, or otherwise united in interest with him. (Co. Civ. Proc. § 398). The entry of an order of reference against the estate of a decedent, under the statute, is equivalent to a service of a summons. (*Bucklin v. Chapin*, 1 Lans. 443; *Hultslander v. Thompson*, 5 Hun, 348). In an action brought by a stockholder of an insolvent bank, in behalf of himself and other stockholders, against the directors on account of their neglect of duties, several stockholders became parties plaintiff to the action, upon their petition more than six years after the bank became insolvent and the directors ceased to control its affairs, and the court held that, for the purposes of the statute of limitations, the action must be treated as if all the stockholders were originally plaintiffs. (*Brinckerhoff v. Bostwick*, 99 N. Y. 185). An attempt to commence an action, in a court of record, is equivalent to the commencement thereof against each defendant, within the meaning of each provision of this act, which limits the time for commencing an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff, or, where the sheriff is a party, to a coroner of the county, in which that defendant, or one of two or more co-defendants, who are joint contractors, or otherwise united in interest with him, resides or last resided; or, if the defendant is a corporation, to a like officer of the county, in which it is established by law, or wherein its general business is or was last transacted, or wherein it keeps, or last kept, an office for the transaction of business. But in order to entitle a plaintiff to the benefit of this section, the delivery of the summons to an officer, must be followed, within sixty days after the expiration of the time limited for the actual commencement of the action, by personal service thereof upon the defendant sought to be charged, or by the first publication of the summons, as against that defendant, pursuant to an order for service upon him in that manner. (Co. Civ. Proc. § 399). The last section, excluding the provision requiring a publication or service of the summons within sixty days, applies to an attempt to commence an action in a court not of record, where the summons is delivered to an officer, au-

thorized to serve the same within the city or town wherein the person resides, or the corporation is located as specified in that section; provided that actual service thereof is made with due diligence. (Co. Civ. Proc. § 400). Where the summons has been delivered to the sheriff in time, with intent that it should be served, but personal service could not be made, and within sixty days substituted service is made, pursuant to an order to that purpose, the action is commenced in time, and is not barred by the statute. (*Clare v. Lockard*, 122 N. Y. 263). If the summons is delivered to the sheriff for service and an attempt is made to serve it, which fails because the defendant is sick and he dies shortly thereafter, the claim is not barred, and a subsequent presentation to the executor, and action upon his rejection, is brought in time. (*Riley v. Riley*, 141 N. Y. 409). Section 399 applies to limitations provided for by contract of the parties. (*Hamilton v. Royal Ins. Co.*, 156 N. Y. 327). An action is not deemed to be commenced against one jointly liable, not named in the summons. (*Shaw v. Cock*, 78 N. Y. 194). If a new party is brought in by amendment, the action is deemed to have been begun against him, only from the time he was brought in. (*Ibid.*). A joint stock association is regarded as a corporation, within sections 399 and 400. (*Shaw v. Cock*, 78 N. Y. 104).

CHAPTER III.

LEAVE TO SUE.

ARTICLE I.....Judgments.

ARTICLE II.....Mortgages.

ARTICLE III.....Official bonds.

ARTICLE IV.....Actions to dissolve a corporation.

ARTICLE V.....Actions by and against receivers.

ARTICLE VI. ...Actions by or against the committee of an incompetent person.

ARTICLE VII...Partition by an infant.

ARTICLE VIII...Leave to sue as a poor person.

There are some cases in which an action cannot be commenced without leave of the court, and these are the following:

ARTICLE I.

JUDGMENTS.

Except in a case where it is otherwise specially prescribed in this act, an action upon a judgment for a sum of money, rendered in a court of record of the state, cannot be maintained between the original parties to the judgment, unless, either,

1. Ten years have elapsed since the docketing of such judgment; or,

2. It was rendered against the defendant by default, for want of an appearance or pleading, and the summons was served upon him, otherwise than personally; or,

3. The court in which the action is brought, has previously made an order, granting leave to bring it. Notice of the application for such an order must be given to the adverse party, or the person proposed to be made the adverse party, personally unless it satisfactorily

appears to the court that personal notice cannot be given, with due diligence; in which case, notice may be given in such manner as the court directs. (Co. Civ. Proc. § 1913). This section applies to judgments recovered before the code. (*Finch v. Carpenter*, 5 Abb. Pr. 225). The assignee of a judgment is not within the statute. (*Tuft v. Braisted*, 4 Duer, 607; *Hedges v. Conger*, 10 St. Rep. 42; *McGrath v. Maxwell*, 17 App. Div. 246). Neither are the representatives of a deceased judgment creditor. (*Smith v. Button*, 2 T. & C. 498; *Freeman v. Dutcher*, 15 Abb. N. C. 131). A judgment may be pleaded as a counter-claim without leave. (*Wells v. Henshaw*, 3 Bosw. 625). The leave must be obtained from the court, in which it was rendered. If it was rendered in the former court of common pleas, it may be obtained from the county court. (*Graham v. Scripture*, 26 How. Pr. 501). In the case of a judgment recovered in one of the courts abolished by the amendments to the constitution of the state, in 1895, it would seem that the leave must be obtained from the supreme court. (Const. Art. 6, § 5, 2d paragraph). It is not necessary that the suit should be brought in the same court, in which the original judgment was recovered. (*Nat. Mch. Bankg. Assn. v. Usher*, 1 Swe. 403). Leave can only be granted upon final judgment, and one upon which an execution can be issued. (*Hanover Fire Ins. Co. v. Tomlinson*, 3 Hun, 630; *Matter of Van Beuren*, 33 App. Div. 158). There is a conflict of authority as to whether the bringing of a suit on a judgment without leave as provided in this section is a mere irregularity, which may be waived, or whether such leave is a substantive right which must be shown to exist. It is held in the following cases to be a matter of substance. (*Farish v. Austin*, 25 Hun, 430; *Graham v. Scripture*, 26 How. Pr. 401; *Cook v. Thurston*, 18 Misc. 506). The weight of authority seems to hold, however, that failure to obtain leave is an irregularity only, which may be waived or cured after suit begun by an order *nunc pro tunc*. (*Church v. Van Beuren*, 55 How. Pr. 489; *German Savings Bk. v. Carrington*, 14 Wk. Dig. 475; *affd.* without opinion by court of appeals, 89 N. Y. 632; *Brush v. Hoar*, 15 N. Y. St. Rep. 859; *Knapp*

v. *Valentine*, 67 N. Y. St. Rep. 582). The opinion of the court of appeals, affirming an order granting *nunc pro tunc* leave to sue on a mortgage debt under section 1628 of the code of civil procedure, is instructive on this point. (*McKernan v. Robinson*, 84 N. Y. 105). It would seem that the objection of no leave obtained can be taken either by a motion to set aside the summons and complaint (*Finch v. Carpenter*, 5 Abb. Pr. 225), or by demurrer to a complaint which fails to allege such leave. (*Freeman v. Dutcher*, 15 Abb. N. C. 431; *Underhill v. Phillips*, 30 App. Div. 238). If a judgment of a justice of the peace is docketed in the county clerk's office, pursuant to the provisions of section 3017 of the code of civil procedure, it becomes a judgment of the county court, and no action can be brought in justice's court without leave of the county court. (*Baldwin v. Roberts*, 30 Hun, 163). A creditor's bill is not an action on a judgment, within this section (*Catlin v. Doughty*, 12 How. Pr. 457; *Quick v. Keeler*, 2 Sand. 636); neither is a proceeding under section 1937 to charge the defendants not summoned. (*Dean v. Eldridge*, 29 How. Pr. 218; *Prince v. Cujas*, 7 Robt. 76). A judgment of the United States circuit court is not within the statute, although it has been docketed in the county clerk's office. (*Goodyear Dental Co. v. Friselle*, 22 Hun, 174).

ARTICLE II.

MORTGAGES.

While an action to foreclose a mortgage upon real property is pending, or after final judgment for the plaintiff therein, no other action shall be commenced or maintained, to recover any part of the mortgage debt, without leave of the court, in which the former action was brought. (Co. Civ. Proc. § 1628). The rule laid down in this section, does not apply where the judgment for foreclosure was rendered in the court of another state (*N. Y. L. In. Co. v. Aitkin*, 125 N. Y. 660), nor to suits on debts secured by mortgages on lands without the state. (*Mu. Li. Ins. Co. v. Smith*, 54 Super. 400).

Leave to commence an action under this section, is in the discretion of the court (*Equitable L. Ins. Co. v. Stercens*, 63 N. Y. 341); and it will not be granted except for a good reason; the mere fact that the value of the premises has been diminished by fire is not enough. (*Eagle v. Underhill*, 3 Edw. 249). Leave will not be granted, if it will be inequitable to enforce the personal liability of a mortgagor. (*Matter of Collins*, 17 Hun, 289). Where a party was left out by mistake, in the foreclosure suit, leave was granted to bring an action upon the bond. (*Kane v. Prentice*, 13 Wk. Dig. 361). The fact that there is an apparent defense, is not a sufficient reason for refusing leave to sue upon the bond; that will be settled on the trial. (*Matter of Hallenbarton*, 1 Law Bull. 12). If the grantee of part of mortgaged premises has covenanted to pay part of the debt, an action cannot be brought against him, upon his covenant after foreclosure, without leave. (*Schofield v. Doscher*, 72 N. Y. 491). An action on the guaranty of a mortgage debt, cannot be brought without leave of the court, after an action to foreclose the mortgage, for the recovery of the debt secured by it. (*McKernan v. Robinson*, 84 N. Y. 105). If leave be not granted, there is no right of action; the plaintiff must allege, and prove such leave. (*Schofield v. Doscher*, 72 N. Y. 491; *McKernan v. Robinson*, 84 N. Y. 105). But the court may grant leave after the action is commenced, *nunc pro tunc*. (*McKernan v. Robinson*, *supra*; *Earl v. David*, 20 Hun, 527; *affd.* 86 N. Y. 643). Such leave, however, cannot be granted *ex parte*, and an order so made should be set aside. (*U. S. Life Ins. Co. v. Poillon*, 25 St. Rep. 534). This statute does not apply to an action by a junior mortgagee, to recover a debt secured by his mortgage, although he has filed a claim to the surplus, arising on the sale of a prior mortgage, and is a party to proceedings for distribution of the surplus (*Wyckoff v. Derlin*, 12 Daly, 144); nor does it apply to an action for contribution by a surety. (*Weed v. Calkins*, 24 Hun, 582). It was held in *Schultz v. Mead* (29 St. Rep. 203; *affd.* 128 N. Y. 680), that, after judgment had been rendered for a deficiency in an action to foreclose a mort-

gage, the case was not within section 1628 of the code and no application for leave to sue for the amount of the deficiency was required under that section.

ARTICLE III.

OFFICIAL BONDS.

Where a sheriff is liable for the escape of a prisoner committed to his custody, or is guilty of any other actionable default or misconduct in his office, the person injured thereby may apply to the supreme court for leave to prosecute the sheriff's official bond. The application must be accompanied with proof, by affidavit, of the default or misconduct complained of, and that satisfaction of the same has not been received, and with a certified copy of the official bond. (Co. Civ. Proc. § 1880). Upon such an application, the court must grant an order, permitting the applicant to maintain an action upon the bond. The action must be brought, in the court which granted the order, by the applicant as plaintiff; and it may be maintained, as if the applicant was the obligee named in the bond, except as otherwise expressly prescribed in this article. (Co. Civ. Proc. § 1881). The provision of the code that the court must grant the order, is not mandatory, but it will be refused, if the question of liability of the sheriff, upon which the action is sought to be brought is pending and undetermined, in the court of appeals (*People v. Conner*, 8 Hun, 533); nor should such leave be given where there is a stay of proceedings on the judgment recovered against the sheriff. (*Matter of Chamberlain*, 28 How. Pr. 1). A recovery against a sheriff is not necessary before the leave is given. (*Ex parte Chester*, 5 Hill, 555). Before leave is granted, it must be shown either by affidavit, or by judgment and execution unsatisfied, that the sheriff is unable to respond in an action. (*Ex parte Noble*, 2 Cow. 590; *Anderson v. Hitchcock*, 2 Wend. 299). The same, or any other applicant, may, in like manner, either before or after judgment in the first action, obtain an order, permitting him to maintain

another action, in the same court, upon the same bond for another default or misconduct. Any number of such orders may be successively made; and neither of the actions authorized thereby, is affected by the pendency of, or the recovery of judgment in, any other, except as otherwise expressly prescribed in this article. (Co. Civ. Proc. § 1882).

Where a surrogate, or an officer acting as surrogate, is guilty of any actionable default or misconduct in his office, the person injured thereby may apply for leave to prosecute the delinquent's official bond. (Co. Civ. Proc. § 1886).

Where a certified copy of the order or judgment of a court, directing a county treasurer to pay or deliver, to one or more persons designated therein, any money, stocks, securities or other investments held by him, subject to the direction of that court, is served upon the county treasurer, if he fails to obey the direction, the person injured thereby may apply for leave to prosecute his official bond. Service upon a county treasurer, as required by this section, may be made personally, or by leaving the paper, either at his office during his absence therefrom, with a person of suitable age and discretion, having charge of the office, or at his residence, or his last residence within the county, with a person of suitable age and discretion. (Co. Civ. Proc. § 1887).

Whenever any county treasurer shall, after service on him personally, or by leaving at his office, in his absence, with some person having charge thereof, or if such service cannot be made, by leaving with some person of suitable age and discretion at his place of residence, or at his last place of residence in the county, if he has departed therefrom, of a certified copy of an order of the court, directing the payment or delivery of any money or securities held by him pursuant to an order of the court, to any person or persons, shall fail or neglect so to do, or where any county treasurer has invested or loaned moneys held by him pursuant to order of the court, or to any person or persons on inadequate or worthless security, and shall fail or neglect when required so to do, to pay over the amount of the moneys so

invested to the person or persons entitled thereto, the court may, by order, direct that an action be brought upon the official bond of such treasurer, against him and his sureties, to recover the amount of the money or securities so directed to be paid or delivered, or of the moneys so invested on inadequate or worthless security, for the benefit of the person or persons in whose behalf the direction shall have been by such order given, and whose name or names appear therein, or their assigns, and thereupon such action may be brought for such purpose. (3 R. S. 9th Ed. 2465).

Where a public officer is required to give an official bond to the people, and special provision is not made by law, for the prosecution of the bond, by or for the benefit of a person who has sustained, by his default, delinquency or misconduct, an injury for which the sureties upon the bond are liable, such a person may apply for leave to prosecute the delinquent's official bond. (Co. Civ. Proc. § 1888). An administrator *de bonis non* may sue the surety on his predecessor's bond without obtaining leave under this section. (*Dunne v. American Surety Co.*, 43 App. Div. 91). A receiver, an assignee of an insolvent debtor, or a trustee or other officer, appointed by a court or a judge, is a public officer within the meaning of section 1888; but where he was appointed by, or pursuant to the order of a court, or in a special proceeding, specified in title twelfth of chapter seventeenth of the code of civil procedure, the application for leave to prosecute his official bond, must be made to the court by which, or pursuant to whose order, he was appointed, or in which the judgment was rendered, as the case may be. An action brought pursuant to such leave, must be brought in the court to which application was made for leave to bring it. (Co. Civ. Proc. § 1890). An application for leave to prosecute an official bond, as prescribed in this article, may be made without notice; but in that case, the officer or either of his sureties may apply upon notice, to vacate an order permitting the applicant to maintain an action upon any ground, showing that it ought not to have been granted. (Co. Civ. Proc. § 1892).

ARTICLE IV.

ACTIONS TO DISSOLVE A CORPORATION.

Upon leave being granted, as prescribed in the next section, the attorney general may bring an action against a corporation, created by or under the laws of the state, to procure a judgment, vacating the charter, or annulling the existence of the corporation, upon the ground that it has either

1. Offended against any provision of an act, by or under which it was created, altered, or renewed, or an act amending the same, and applicable to the corporation; or,

2. Violated any provision of law, whereby it has forfeited its charter, or become liable to be dissolved, by the abuse of its powers; or,

3. Forfeited its privileges or franchises, by a failure to exercise its powers; or,

4. Done or omitted any act which amounts to a surrender of its incorporate rights, privileges, and franchises; or,

5. Exercised a privilege or franchise, not conferred upon it by law. (Co. Civ. Proc. § 1798). Before granting leave, the court may, in its discretion, require such previous notice of the application as it thinks proper, to be given to the corporation or any officer, and may hear the corporation in opposition thereto. (Co. Civ. Proc. § 1799). The court may direct notice to be given to the corporation. (*People v. The Boston, H. T. & West. R. Co.*, 27 Hun, 528; *People v. Mu. Union Tel. Co.*, 2 McCarty, 295). The action cannot be maintained without leave of the court (*People v. Lowe*, 47 Hun, 577), but the attorney general alone is to decide whether it will serve the public interest to bring an action to vacate the charter, and the only duty of the court, when the application is made to it, is to see that the attorney general alleges sufficient facts against the corporation to make a *prima facie* case, or one of such gravity that it seems proper that there should be a trial to determine the truth of the facts. (*Matter of Ulster & Delaware*

R. R. Co., 50 Hun, 511). Upon appeal from an order, granting to the attorney general leave to bring an action to vacate the charter of a corporation, the court will not attempt to determine the merits of the action. (*Id.*). Before authority should be given to the attorney general under this section that official should point out in his written petition the particular acts, done or omitted, which, in his judgment, are sufficient to justify the bringing of the action and should also allege wherein the corporation has violated the laws. The order granting leave should also specify the grounds on which the action is to be brought. (*Matter of Atty. Gen'l*, 81 Hun, 541).

In either of the following cases, an action to procure a judgment, dissolving a corporation, created by or under the laws of the state, and forfeiting its corporate rights, privileges and franchises, may be maintained, as prescribed in the next section :

1. Where the corporation has remained insolvent for at least one year.

2. Where it has neglected or refused, for at least one year, to pay and discharge its notes, or other evidences of debt.

3. Where it has suspended its ordinary and lawful business for at least one year.

4. If it has banking powers, or power to make loans on pledges or deposits, or to make insurances, where it becomes insolvent or unable to pay its debts, or has violated any provision of the act, by or under which it was incorporated, or of any other act binding upon it. (*Co. Civ. Proc.* § 1785). An action specified in the last section, may be maintained by the attorney general, in the name and in behalf of the people. And whenever a creditor or stockholder of any corporation submits to the attorney general a written statement of facts, verified by oath, showing grounds for an action under the provisions of the last section, and the attorney general omits, for sixty days after submission, to commence an action specified in the last section, then, and not otherwise, such creditor or stockholder may apply to the

proper court for leave to commence such an action, and on obtaining leave may maintain the same accordingly. (Co. Civ. Proc. § 1786).

ARTICLE V.

ACTIONS BY AND AGAINST RECEIVERS.

SECTION.

1. Actions by Receivers.
2. Actions against Receivers.

Sec. 1. Actions by Receivers.

A receiver is an officer of the court, and should not bring a suit, without leave of the court which appointed him. (*Merritt v. Lyon*, 16 Wend. 405, 410; *Smith v. Woodruff*, 6 Abb. Pr. 65; *Foster v. Townsend*, 68 N. Y. 203, 206). If he sues without leave, he will usually be charged with costs. (*Smith v. Woodruff*, *supra*; *Cumming v. Egerton*, 9 Bosw. 684). It is proper to charge the receiver with costs personally, if he has proceeded in the action without proper care or in bad faith, or in a matter which is merely personal to himself, and which can result in no advantage to the estate which he represents. (*Chapin v. Townsend*, 4 Hun, 779; *Matter of Castle*, 2 St. Rep. 362). Where leave to sue has been granted a receiver, it will be presumed that he has duly qualified. (*Hegewisch v. Silver*, 140 N. Y. 414). Costs will not be allowed to a receiver of a debtor's estate, in an action brought by him against an insolvent from whom he is unable to collect his costs, unless it is brought by order of the court, or by consent of all persons interested in the funds in his hands. (General Rule 77). Whenever a receiver, appointed under proceedings supplementary to execution, shall apply for leave to bring an action, he shall present and file with his application, the written request of the creditor in whose behalf he was appointed, that such action be brought; or else he shall give a bond with sufficient security, and properly acknowledged and approved by the court, to the person against whom the action is to be brought, conditioned for the payment of any costs which may be recovered against such receiver.

And leave to bring actions shall not be granted, except on such written request, or on the giving of such security. In all other cases, where a receiver applies to the court for leave to bring an action, he shall show in such application, that he has sufficient property in his actual possession, to secure the person, against whom the action is to be brought, for any costs which he may recover against such receiver; otherwise the court may require the receiver to give such bond, conditioned for the payment of costs, and with such security as is above mentioned. (General Rule 78). The receiver must sue, when authority has been granted to him, and he cannot be restrained in another suit. The proper way to restrain the suit, is by a motion in the action in which he was appointed. (*Winfield v. Bacon*, 24 Barb. 154). Unless particularly restricted by the court, he may select his own tribunal. (*Rockwell v. Merwin*, 45 N. Y. 166). He is, however, the officer of the court which appoints him and cannot sue in a foreign jurisdiction for the property of the debtor. (*Booth v. Clark*, 17 How. [U. S.] 322). Notice of application by a receiver for leave to sue is not required.

Sec. 2. Actions Against Receivers.

No person can sue a receiver, or take any other proceedings against him, without leave of the court which appointed him. (*Foster v. Townsend*, 2 Abb. N. C. 29, and cases cited on page 41; *DeGroot v. Jay*, 30 Barb. 483). Whoever does so is guilty of a contempt. (Cases cited *supra*; *Taylor v. Baldwin*, 14 Abb. Pr. 166; High on Receivers, §§ 254, 255). Whether leave will be granted or not, is in the discretion of the court, but it is not usual to refuse it, unless it is clear that there is no foundation for the claim. (*Ex parte Garland*, 3 DeG. F. & J. 766; *In re Platt*, 41 Super. 513). The court will usually require the suit to be brought in the court where the receiver was appointed. (*In re Platt*, *supra*). If leave to sue a receiver is improvidently granted, by the supreme court in one district, it may be vacated in another. (*Attorney General v. North America Life Ins. Co.*, 6 Abb. N. C. 293). A suit brought without leave, is

regular until the court interferes, and judgment in it is valid. (*Hirshfeld v. Kalischer*, 81 Hun, 606; *Hackley v. Draper*, 4 T. & C. 614). Where suit is brought without leave the proper practice is for defendant to apply for a stay, or to punish plaintiff for contempt, but on such application leave will be granted *nunc pro tunc*, if the case is a proper one. (*Hirshfeld v. Kalischer*, *supra*). Application for leave to sue a receiver, must be made to the court by which he is appointed, and notice of the application should be given to the receiver. If the receiver was appointed in an action, the motion for leave to sue must be made in the judicial district where the action was brought, or in a county adjoining the county wherein the action was brought. (*Matter of Com'l Bk.*, 35 App. Div. 224).

ARTICLE VI.

ACTIONS BY OR AGAINST THE COMMITTEE OF INCOMPETENT PERSON.

The committee, either of a person or of the property of an incompetent person, is subject to the direction and control of the court by which he was appointed, with respect to the execution of his duties. (Co. Civ. Proc. § 2339). He may maintain in his own name, adding his official title, any action or special proceeding, which the person, with respect to whom he was appointed, might have maintained, if the appointment had not been made. (Co. Civ. Proc. § 2340). The rule is laid down in several of the books on practice, that such committees must apply for leave to sue (1 Whit. Pr. 109; 1 Wait's Pr. 201-202); but no authority is cited establishing the rule. It is believed that it is not necessary for the committee of an incompetent person to obtain leave to sue, before bringing the action, but, as he is subject to the control of the court, it is advisable for him to do it. After the appointment of a committee of a lunatic, idiot or habitual drunkard, a creditor can only sue by permission of the court by which the committee was appointed. (*Matter of Heller*, 3 Paige 199; *Williams v. Estate of Cameron*, 26 Barb. 172). If an action has been begun against

one who is afterwards adjudged a lunatic, it cannot be continued against his committee, without leave of the court which appointed him. (*Matter of Delahunty*, 28 Abb. N. C. 245; 44 St. Rep. 836; 18 Supp. 395). If the action has been continued against the committee, without leave of the court, and judgment recovered, leave to sue *nunc pro tunc* will not be granted. (*Id.*). The application must be by petition (Cases cited *supra*), and upon notice to the committee. Leave will be granted, where the petition shows a case in which relief would be granted in a court of equity to the petitioner, but it will not necessarily be denied because there is great dispute between the parties with regard to the facts. (*Matter of Wing*, 5 T. & C. 205; *Kent v. West*, 33 App. Div. 112; appeal dismissed, 163 N. Y. 589). A reference, however, will be preferred by the court whenever it is proper. (*Williams v. Estate of Cameron*, 26 Barb. 172. The proper mode of relief when an action is brought without leave, is by a motion for a stay, or by proceedings for contempt. (*Matter of Heller*, 3 Paige 199; *Soverhill v. Dickson*, 5 How. Pr. 109; and cases cited below). A judgment obtained without leave is not void. (*Stevenbergh v. Schoolcraft*, 2 Barb. 153; *Crippen v. Culver*, 13 Barb. 424; see also, *Dunham v. Fitch*, 48 App. Div. 321, 326). The remedy against such a judgment, is to move to set it aside, or to proceed for contempt against the plaintiff (*Crippen v. Culver*, *supra*), or in equity to be relieved from the judgment, (*Matter of Hopper*, 5 Paige, 491), or to restrain the enforcement of the judgment. (*Matter of Delahunty*, *supra*). The application for leave to bring an action against the committee is a special proceeding. (*Williams v. Cameron*, 26 Barb. 172).

ARTICLE VII.

PARTITION BY AN INFANT.

An action for the partition of real property shall not be brought by an infant, except by the written authority of the surrogate of the county in which the property, or a part thereof, is situated. The authority shall not be

given, unless the surrogate is satisfied, by affidavit or other competent evidence, that the interests of the infant will be promoted by bringing the action. A judgment for a partition or sale shall not be rendered in such an action, unless the court is satisfied that the interests of the infant will be promoted thereby, and that fact is expressly recited in the judgment. (Co. Civ. Proc. § 1534). The purchaser of the land, in an action of partition brought by an infant without leave, will not be compelled to take title. (*Struppman v. Muller*, 52 How. Pr. 211). If it is referred to a referee to inquire whether the interests of the infant require the partition, he should report the facts. (*In re Mensac*, 15 How. Pr. 383).

ARTICLE VIII.

LEAVE TO SUE AS A POOR PERSON.

A poor person, whether an adult or infant, not being of ability to sue, who alleges that he has a cause of action against another person, may apply, by petition, to the court in which the action is pending, or in which it is intended to be brought, for leave to prosecute as a poor person, and to have an attorney and counselor assigned to conduct his action. (Co. Civ. Proc. § 458). The petition must state:

1. The nature of the action brought, or intended to be brought.

2. That the applicant is not worth one hundred dollars, beside the wearing apparel and furniture, necessary for himself and his family, and the subject-matter of the action.

It must be verified by the applicant's affidavit, unless the applicant is an infant under the age of fourteen years, and in that case by the affidavit of his guardian appointed in said action and supported by a certificate of a counsellor-at-law, to the effect that he has examined the case and is of the opinion that the applicant has a good cause of action. (Co. Civ. Proc. § 459).

The application for leave to sue as a poor person, after suit is brought, must be upon notice. (*Thomas v. Wilson*,

6 Hill, 257; *Ostrander v. Harper*, 14 How. Pr. 16; *Isnard v. Caseaux*, 1 Paige, 39). The court to which the petition is presented, if satisfied of the truth of the facts alleged, and that the applicant has a good cause of action, may, by order, admit him to prosecute as a poor person, and assign to him an attorney and counsel to prosecute his action, who must act therein without compensation. (Co. Civ. Proc. § 460). Whether or not leave will be granted, is discretionary with the court. (*Alexander v. Myers*, 8 Daly, 112; *Young v. Nassau Electric R. R. Co.*, 34 App. Div. 126). Upon the application, affidavits may be read in opposition, upon the merits of the alleged cause of action, and the court may deny the motion if it is not satisfied that the applicant has good cause of action. (*Beyer v. Clark*, 29 Abb. N. C. 338; 22 Supp. 540; *Downs v. Farley*, 18 Abb. N. C. 464; *Young v. Nassau Electric R. R. Co.*, *supra*; *McNamara v. Nolan*, 13 Misc. 76). The court is not required to assign as counsel for the poor person, the attorney making the application (*Helmprecht v. Bowen*, 87 Hun, 362), and should not do so unless it appears that the party making the application knows that the counsel so assigned is bound to act without compensation, and where the counsel certifies that he will so act, and that no charge or claim for counsel fees by anybody will be made. (*Harris v. Mu. Li. Ins. Co.*, 37 St. Rep. 599; *Daus v. Nussberger*, 25 App. Div. 185; *Cahill v. Manhattan R. Co.*, 38 App. Div. 314). The court has power to make an order, allowing a non-resident to sue as a poor person (*Harris v. Mu. Li. Ins. Co.*, *supra*), but such an order will not usually be made. (*Anonymous*, 10 Abb. N. C. 82). The order should assign counsel. (*Daus v. Nussberger*, *supra*). A married woman may be allowed to sue as a poor person, in an action in respect to her separate property, and for injuries to her person (*Roberti v. Carlton*, 18 How. Pr. 466); or for a separation, if she has reasonable grounds for a suit. (*Robertson v. Robertson*, 3 Paige, 387). The husband may be allowed to sue for a separation as a poor person. (*Petition of McAllen*, 1 Law Bul. 60). An infant, suing by a guardian *ad litem*, may be allowed to sue as a poor

person (*Erickson v. Poey*, 5 Civ. Proc. Rep. 379; *Hotaling v. McKenzie*, 7 Civ. Proc. Rep. 320); but one of several plaintiffs cannot be permitted to sue in that way. (*Ostrander v. Harper*, 14 How. Pr. 16). Leave to sue as a poor person, will not be denied to an infant plaintiff upon the ground that his guardian *ad litem* is his father, and a man of wealth (*Shapiro v. Burns*, 7 Misc. 418), but the court will impose as a condition, that counsel will stipulate to prosecute the action without compensation, except taxable costs, and proof must be produced that there has been no agreement or understanding for compensation. (*Bonadua v. Third Ave. Ry. Co.*, 30 Supp. 410). The court is not authorized to permit the committee of a lunatic to sue as a poor person. (*Bechtle v. Man. Ry. Co.*, 31 Abb. N. C. 483; 30 Supp. 410). These applications are not to be encouraged, and the statute must, in all cases, be strictly construed. (*Isnard v. Caseaux*, 1 Paige, 39; *Moore v. Cooley*, 2 Hill, 412; *Bechtle v. Man. Ry. Co.*, *supra*). They will not be granted after a delay of a year after the suit is brought (*Florence v. Bulkley*, 1 Duer, 705); nor after a judgment against the plaintiffs on the merits (*Ostrander v. Harper*, *supra*); nor where the action is on a tort in another state, both parties being non-residents (*Alexander v. Myers*, 8 Daly, 112); nor in an action for damages causing the death of the plaintiff's son (*Kennedy v. Twenty-third St. R. R. Co.*, 1 Law Bul. 31); nor where plaintiff's attorney has an interest in the claim. (*Joyce v. Cooper*, 49 Super. 115; *Cahill v. Manhattan R. Co.*, 38 App. Div. 314). Such an order will not be made where it appears that the plaintiff has made an agreement with his attorney by which the latter was to advance the expenses of the suit, and receive a proportion of the recovery as his compensation (*Downs v. Farley*, 18 Abb. N. C. 464). The fact that an order has been made, requiring the plaintiff to give security for costs, does not preclude the court from afterwards allowing him to sue as a poor person. (*Shearman v. Hope*, 106 N. Y. 664; *Shapiro v. Burnes*, 7 Misc. 418). A person so admitted may prosecute his action, without paying fees to any officer; and he shall not be prevented from

prosecuting the same, by reason of his being liable for the costs of a former action, brought by him against the same defendant. If judgment is rendered against him, or his complaint is dismissed, costs shall not be awarded against him. (Co. Civ. Proc. § 461). But the plaintiff, although permitted to sue as a poor person, will not be excused from paying costs already accrued. (*Brown v. Story*, 1 Paige, 588; *Lyons v. Murat*, 4 Abb. N. C. 14). If a person so admitted is guilty of improper conduct in the prosecution of his action, or of willful or unnecessary delay, the court may, in its discretion, annul the order admitting him to prosecute as a poor person; and he shall thereafter be deprived of all the privileges conferred thereby. (Co. Civ. Proc. § 462). A defendant in an action involving his right, title, or interest, in or to real or personal property, may petition the court, in which the action is pending, for leave to defend the action as a poor person, and to have an attorney and counsel to conduct his defense. (Co. Civ. Proc. § 463). The petition must contain the same matters, respecting the ability of the petitioner, required to be contained in a petition for leave to prosecute as a poor person; and it must be supported by a similar certificate relating to the defense. (Co. Civ. Proc. § 464). The provisions of this article, relating to the order, to be made upon an application for leave to prosecute as a poor person, and the proceedings subsequent thereto, apply to the order and subsequent proceedings, upon an application for leave to defend as a poor person. (Co. Civ. Proc. § 465). An order, made as prescribed in this article, does not authorize the petitioner to take or maintain an appeal as a poor person; but where an appeal is taken by the adverse party, the order is applicable, in favor of petitioner, as respondent in the appeal. (Co. Civ. Proc. § 466). In *Whelan v. Whelan* (3 Cow. 537), the court allowed the appellant to pursue his appeal as a poor person. The rule is, however, that although a poor person can appeal, he is liable to costs, if unsuccessful. (*Moore v. City of Troy*, 38 Hun, 401; *Hayden v. Hayden*, 8 App. Div. 547). Where costs are awarded in favor of

a person, who has been admitted to prosecute or defend as a poor person, as prescribed in this article, they must be paid over to his attorney, when collected from the adverse party, and distributed among the attorney and counsel assigned to the poor person, as the court directs. (Co. Civ. Proc. § 467).

CHAPTER IV.

THE PARTIES TO AN ACTION.

- ARTICLE I. . . . General rules as to parties.
ARTICLE II. . . . Agents and principals.
ARTICLE III. . . . Assignees.
ARTICLE IV. . . . Unincorporated associations.
ARTICLE V. . . . Corporations, directors and stockholders.
ARTICLE VI. . . . Estates of deceased persons.
ARTICLE VII. . . . Public officers.
ARTICLE VIII. . . . Trustees of an express trust.
ARTICLE IX. . . . Where one may sue or be sued for all.
ARTICLE X. . . . Joint and several parties.
ARTICLE XI. . . . Proceedings against defendants severally liable.
ARTICLE XII. . . . Parties in actions respecting real estate.
ARTICLE XIII. . . . Where the defendant or his name is unknown.
ARTICLE XIV. . . . Infant plaintiffs and defendants.

ARTICLE I.

GENERAL RULES AS TO PARTIES.

The parties are those who are named in the summons, or other process, by which the action is begun. (*Woods v. DeFiganiere*, 1 Robt. 607). The party prosecuting a civil action is styled the plaintiff. The adverse party is styled the defendant. (Co. Civ. Proc. § 3338). Although more than one are named as a party defendant in the summons, those not served are not strictly parties to the action. (*Norton v. Hayes*, 4 Denio, 245; *Robinson v. Frost*, 14 Barb. 536; *The East River Bk. v. Cutting*, 1 Bos. 636). The general rules as to who must be parties to an action are laid down in the code of civil procedure in sections 446 to 449, as follows: All persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly prescribed in this act. (Co. Civ. Proc. § 446). Any person may be made a defendant, who has or claims an interest in the contro-

versy, adverse to the plaintiff, or who is a necessary party defendant, for the complete determination or settlement of a question involved therein; except as otherwise expressly prescribed in this act. (Co. Civ. Proc. § 447). Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, except as otherwise expressly prescribed in this act. But if the consent of any one, who ought to be joined as a plaintiff, cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. And where the question is one of a common or general interest of many persons; or where the persons, who might be made parties, are very numerous, and it may be impracticable to bring then all before the court, one or more may sue or defend for the benefit of all. (Co. Civ. Proc. § 448). Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A person, with whom or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section. (Co. Civ. Proc. § 449). The idea under-lying the rules here laid down, is that the rights of every person who has an interest in the subject matter of the litigation, shall be disposed of in one action. To secure this object, the code has not only provided that the rights of all the parties may be adjudicated between themselves, but also whenever it is necessary, new parties may be brought in (Co. Civ. Proc. § 452), at any stage of the action. (Co. Civ. Proc. § 723). But while the code thus permits all parties who have an interest in the action or in real property, the title to which may be affected or for injury to which the complaint demands relief, to come in, it does not require any to be brought in, except those without whose presence, no effective judgment could be made respecting the matter in controversy. These are really the only necessary parties to any action. (*Bailey v. Inglee*, 2 Paige, 278; *Wendell v. Van Rensselaer*, 1 John. Ch. 344;

Murray v. Hay, 1 Barb. Ch. 59). Other persons, who have an interest in the subject of the controversy, which is not necessarily affected by the judgment, but which may be properly settled by it, are not necessary parties strictly speaking, but are only proper parties. As stated by Prof. Pomeroy, necessary parties defendant are those without whom no decree at all can be rendered; proper parties defendant are those whose presence renders the decree more effectual, and all the proper parties are those by whose presence the decree becomes a complete determination of all the questions that can be raised, and of all the rights which are connected with the subject matter of the controversy. Such persons are necessary *sub modo*, that is, they must be brought in, if it is expected to conclude them by the decree; but to call them necessary, absolutely, is to ignore the familiar and fundamental distinction between the two classes of parties which has just been mentioned. (*Remedies and Remedial Rights*, §§ 329, 330). The code evidently preserves this distinction, as the sections, prescribing who may be joined as parties, are permissive merely, and not compulsory in their form. The present legal owners of property, having a vested interest, are, generally speaking, the only necessary parties in an action in regard to it (*Kent v. Church of St. Michael*, 136 N. Y. 10), and they need not join those having equitable interests. (*Korn v. Met. Ele. R. R. Co.*, 59 Hun, 505; *affd.* without opinion, 129 N. Y. 648). But the sections of the code on that subject being permissive, only, it is not forbidden for the legal owner, who does not choose to sue separately, to join the beneficiaries, if he sees fit, and a demurrer for misjoinder for parties, will not be sustained if he does so. (*Peck v. Richardson*, 12 Misc. 310; 44 N. Y. Supp. 919). If one claims in a representative capacity, he must be named in the action in that capacity, or the necessary allegations must be put into the pleadings to charge him as such. Merely naming him individually as a party, is not sufficient to empower the court to adjudicate upon his representative rights. This is so although he has no interest whatever except a representative one. (*Landon v.*

Townshend, 129 N. Y. 166; 112 N. Y. 93). Section 452 by implication, forbids the plaintiff from proceeding until all necessary parties are brought in, and the court should not permit him to do so until that has been done. *Mahr v. The N. U. F. Ins. Society*, 127 N. Y. 452; *First Natl. Bk. v. Shuler*, 153 N. Y. 163). It is provided in section 452, that when a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may be in any owner affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by proper amendment. (Co. Civ. Proc. § 452). When the action affects the title to specific property, the right of the party having an interest in the controversy, is absolute, and the court has no power to impose any conditions which will limit that right. (*Lawton v. Lawton*, 54 Hun, 415; *Uhlfelder v. Tamsen*, 15 App. Div. 436). It has been held, however, that, although this right is absolute, a person by his conduct may preclude himself from asserting such right and conditions may then be imposed. (*Wall v. Beach*, 20 App. Div. 480). Where an action has been brought for replevin, a third party who claims an interest in the property is entitled to be made a defendant upon his own application. (*Rosenberg v. Salomon*, 144 N. Y. 92). But the section does not permit the court to require the plaintiff to bring in as defendant, one whom he does not choose to sue; it applies only to applications made by a person who desires to come in. (*Chapman v. Forbes*, 123 N. Y. 532). Where the plaintiff asks simply for a money judgment against the defendant, the court will not bring in any person as defendant, except one whom the plaintiff has named as such in his summons. The remedy for a failure to bring in the proper parties in such a case, is by demurrer or answer. (*Chapman v. Forbes*, *supra*). Section 452 does not apply to special proceedings. (*Peo. ex rel. Steingoetter v. The County Canvassers*, 18 N. Y. St. Rep. 797). In actions of tort, there is no "subject of the action," properly so called, and several persons who have been separately injured

by the same tort, cannot join as plaintiffs in one action. (*Hynes v. F. L. & T. Co.*, 31 St. Rep. 136; 9 Supp. 260; *Gray v. Rothschild*, 112 N. Y. 668). The interest of the parties must be adverse, and therefore the same persons cannot be plaintiff and defendant (*Meth. Epis. Ch. in Pulteney v. Stewart*, 27 Barb. 553; *Sherwood v. Barton*, 36 Barb. 284); but relief may be granted in an action between two firms, or between two estates, although the same person is a partner in the same firm, or a representative of each estate. (*Cole v. Reynolds*, 18 N. Y. 74; *Neilly v. Neilly*, 23 Hun, 651).

It is not easy to deduce from the cases, any other general rules as to the parties in an action than are given in the code, but an attempt will be made to classify the statutory provisions, and the decisions upon the subject, that it may be seen how these rules have been applied with regard to different parties, and in different kinds of actions.

ARTICLE II.

AGENTS AND PRINCIPALS.

The principal, and not the agent who made the contract, or who is appointed to make collections, is the proper party to sue. (*Buckbee v. Brown*, 21 Wend. 110; *Oakey v. Bend*, 3 Edw. Ch. 484). Although the agent has the legal title, if he has no right to receive the proceeds, he is not a proper party plaintiff. (*Bell v. Tilden*, 16 Hun, 346; *Iselin v. Rowland*, 30 Hun, 488). The principal may sue upon the contract made for him by his agent, although the name of the principal was not disclosed if the contract is not under seal (*Briggs v. Partridge*, 64 N. Y. 357; *Beebe v. Robert*, 12 Wend. 413; *I. P. & C. R. R. Co., v. Tyng*, 63 N. Y. 653), but if the contract is under seal, and signed by the agent in his own name as such, without stating the name of the principal, the agent alone can sue. (*Schaefer v. Henkel*, 75 N. Y. 378; *Henricus v. Englert*, 137 N. Y. 488). If a contract, not under seal, is made by an agent in his own name, for an undisclosed principal, either

the principal or the agent may sue upon it, and it makes no difference whether he describes himself as agent or not. An auctioneer, who sells goods for a third party, may sue in his own name for the price. (*Minturn v. Main*, 7 N. Y. 220). An agent may sue in his own name, upon a contract made with him as such, and for the performance of which he is bound. (*Nelson v. Nixon*, 13 Abb. Pr. 104). An action against a stakeholder for moneys deposited upon a wager, must be brought by the person who owned the money, and not by the agent who deposited it for him. (*Ruckman v. Pitcher*, 20 N. Y. 9).

ARTICLE III.

ASSIGNEES.

The object of requiring all suits to be brought in the name of the real property in interest, was to give full effect to assignments of rights of action, by permitting and requiring every assignee to sue in his own name. And the code has therefore provided, that where a claim or demand can be transferred, the transfer thereof passes an interest, which the transferee may enforce by an action or special proceeding, or interpose as a defense or counter-claim, in his own name, as the transferor might have done; subject to any defense or counter-claim, existing against the transferor, before notice of the transfer, or against the transferee. (Co. Civ. Proc. § 1909). But this section does not apply, where the rights or liabilities of a party to a claim or demand, which is transferred, are regulated by special provision of law; nor does it vary the rights or liabilities of a party to a negotiable instrument, which is transferred. (*Id.*). If, as between the assignor and assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest, whether the assignment was with or without consideration, and notwithstanding the assignee may have taken it, subject to all equities between the assignor and third persons. The consideration

and circumstances of the transfer may be important, with a view to settle the equities and establish the rights of others; but if it is absolute as between the immediate parties to it, the assignee not only may, but must, bring the action in his own name (*Cummings v. Morris*, 25 N. Y. 625-627; *Allen v. Brown*, 44 N. Y. 228; *Sheridan v. The Mayor etc.*, 68 N. Y. 30; *Freeman v. Falconer*, 45 Super. 383); but this does not authorize a mere agent to sue. (*Iselin v. Rowland*, 30 Hun, 488). The legal title is not necessary to enable the plaintiff to maintain an action. If he has the whole interest as against the assignor, so that payment to him would protect the debtor, he may sue upon the claim, although he has not yet acquired the full legal title. (*Pomeroy on Rem.* § 127; *Hastings v. McKinley*, 1 E. D. Smith, 273). The defendant, however, may always show that another and not the plaintiff, is the real party in interest. (*Hays v. Hathorn*, 74 N. Y. 486). The assignee who holds a claim as a pledge may sue. (*Sheldon v. Wood*, 2 Bosw. 267; *affd., sub nom., Byxbie v. Wood*, 24 N. Y. 607). If the assignor has an existing interest in the property after the assignment, he may sue for its enforcement, making the assignee, however, a party. (*Ridgway v. Bacon*, 72 Hun, 211). After a right of action has arisen upon a special guaranty, it is assignable, and the suit must be brought in the name of the assignee. (*Evansville Nat. Bk. v. Kaufmann*, 93 N. Y. 273). Where the executor of an estate has assigned a claim against the testator, the assignee may sue on it. (*Snyder v. Snyder*, 96 N. Y. 88).

ARTICLE IV.

UNINCORPORATED ASSOCIATIONS.

An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association, consisting of seven or more persons, to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action, or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action

may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate shares of any moneys lawfully expended by such association for the benefit of such associates, or to recover any lawful claim of such association against such member or members. An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section. (Co. Civ. Proc. § 1919). This article does not prevent an action from being brought by or against all the members of the association, except as prescribed in section nineteen hundred and twenty-two of the code. (Co. Civ. Proc. § 1923). In actions against the officers of a joint stock association under section 1919 above cited, the associates are not necessary parties. (*Olery v. Brown*, 51 How. Pr. 92). The president or officer suing, is a corporation sole, and may be sued by one of the members. (*Westcott v. Fargo*, 61 N. Y. 542). Such member may maintain against the president, an action for the maintenance by the association, of a private nuisance. (*Saltsman v. Shults*, 14 Hun, 256). The president may sue one of the shareholders, on contract (*Waterbury v. The M. U. Exp. Co.*, 50 Barb. 157; *Bray v. Farwell*, 3 Lans. 495); or for a penalty. (*Bridenbacker v. Hoard*, 32 How. Pr. 289). The president, secretary and treasurer of a joint stock association, cannot all be joined in an action against the association under these sections. (*Schmidt v. Gunther*, 5 Daly, 452). An action for a libel committed by a joint stock association, is properly brought against the president. (*Van Aernam v. McCune*, 32 Hun, 316). A social club may be sued in the name of the president, under section 1919. (*Ebbinghousen v. Worth Club*, 4 Abb. N.

C. 300). It was held that volunteer fire companies in New York city, could not sue by their president, under the laws of 1849 or 1851. (*Masterton v. Bolts*, 4 Abb. Pr. 130). But such companies seem to be within section 1919 above cited. It applies to Odd Fellows' Lodges (*Cohn v. Bonst*, 36 Hun, 562; *Tibbetts v. Blood*, 21 Barb. 650); and to a missionary society. (*DeWitt v. Chandler*, 11 Abb. Pr. 459); and to a local assembly of the Knights of Labor (*Wicks v. Monihan*, 130 N. Y. 232); and to the New York Stock Exchange (*Sewell v. Ives*, 61 How. Pr. 54). In an action brought under this section, the president, or officer against whom the action is brought, is the only "party" defendant, within the meaning of section 870 of the code of civil procedure, and, although sued in his representative capacity, he may be examined before trial in a proper case (*McGuffin v. Dinsmore*, 4 Abb. N. C. 241); and such officer is the only one of the association who can be examined before trial. (*Woods v. De Figaniere*, 1 Robt. 607). The officer against whom the action is brought is the only member of the association who can verify the answer as a party defendant. (*Tallmadge v. Lounsbury*, 10 N. Y. Supp. 129). An action cannot be maintained against the president or treasurer under section 1919, upon any cause of action for which the plaintiff could not maintain an action against all of the associates, either jointly or severally. (*McCabe v. Goodfellow*, 133 N. Y. 89).

ARTICLE V.

CORPORATIONS, DIRECTORS AND STOCKHOLDERS.

Where a corporation is a defendant upon a claim made against it, the directors are not proper parties. (*Chase v. Vanderbilt*, 62 N. Y. 307). An action against the agents or officers of a corporation, for damages for loss to it, must be brought by the corporation, and not by the stockholders (*Forbes v. Whitloch*, 3 Edw. Ch. 470); but if the wrong doers have control of the corporation, or the corporation, being applied to refuses to sue, an action may be brought by the stockholders. (*Cun-*

ningham v. Pell, 5 Paige, 607; *Greaves v. Gouge*, 69 N. Y. 154). The corporation, however, must be made a party defendant in such case (*Smith v. Rathbun*, 66 Barb. 402; *Greaves v. Gouge*, *supra*), although it has ceased to transact business. (*Allen v. N. J. South. R. Co.*, 49 How. Pr. 14). All the fraudulent directors are not necessary parties, in an action brought to obtain satisfaction for fraudulent breach of trust. (*Cunningham v. Pell supra*; *Mayne v. Griswold*, 3 Sandf. 463). Suits by the stockholders against the officers, to recover assets, or to restrain malfeasance, must be alleged to be brought for the benefit of all. (*Robinson v. Smith*, 3 Paige, 223; *Smith v. Rathbun*, 66 Barb. 402). In an action to set aside a purchase of the property of the corporation, or to restrain the payment of money under an illegal contract, the alleged fraudulent purchaser, or the contractors, must be parties (*Gray v. N. Y. & Va. Stp. Co.*, 3 Hun, 383; *Dinsmore v. A. & P. R. Co.*, 46 How. Pr. 193); but the corporation is not a necessary party, in an action against an officer for damages for issue of spurious stock. (*Seiser v. Mali*, 6 Abb. Pr. 270, note; 41 N. Y. 619). In an action by a receiver of a corporation to set aside a judgment against it as fraudulent, the corporation is a necessary party. (*Hubbell v. Merchants Nat. Bk.*, 42 Hun, 200). Where the action is brought by a creditor of a corporation, and the stockholders, directors, trustees, or other officers, or any of them, are made liable by law, in any event or contingency, for the payment of his debt, the persons, so made liable, may be made parties defendant, by the original or by a supplemental complaint; and their liability may be declared and enforced by the judgment in the action. (Co. Civ. Proc. § 1790). Where the stockholders, directors, trustees, or other officers of a corporation, who are made liable, in any event or contingency, for the payment of a debt, are not made parties defendant, as prescribed in the last section, the plaintiff in the action may maintain a separate action against them, to procure a judgment, declaring, apportioning and enforcing their liability. (Co. Civ. Proc. § 1791). These sections, however, do not repeal or affect any

special provision of law, prescribing the mode of enforcing the liability of the stockholders of a particular kind of corporation. (Co. Civ. Proc. § 1796). In an action to establish the liability of the directors of a corporation, for creating debts beyond the capital, all the directors must be parties defendant. (*McClave v. Thompson*, 36 Hun, 365). An action against a trustee for failure to file a report, or for filing a false report, may be brought against one, and the others need not be joined (*Halstead v. Dodge*, 51 Super. 169; *Bonnell v. Griswold*, 68 N. Y. 294; *Hoag v. Lamont*, 60 N. Y. 96); but the plaintiff may join all who are liable, in one action if he desires. The stockholders of a corporation may join as plaintiffs, in an action to have the funds belonging to the corporation, diverted by its officers, accounted for. (*Barr v. N. Y. L. E. & Western R. Co.*, 96 N. Y. 444). An action under the stock corporation law, to charge a stockholder, may be brought by one creditor against one stockholder (*Weeks v. Love*, 50 N. Y. 568; *McMaster v. Davidson*, 29 Hun, 542); or all the creditors, or one creditor in behalf of all, may bring an action against the stockholders to enforce the liability (*Mathez v. Neidig*, 72 N. Y. 100); but a receiver cannot bring the action (*Farnsworth v. Wood*, 91 N. Y. 308); nor are the trustees necessary parties. (*Harris v. Norvell*, 1 Abb. N. C. 127).

ARTICLE VI.

ESTATES OF DECEASED PERSONS.

An action or special proceeding, by an executor or administrator, upon a cause of action, belonging to him in his representative capacity, or an action or special proceeding, commenced against him except where it is brought to charge him personally, must be brought by or against him in his representative capacity. A judgment, recovered against an administrator or executor, without describing him in his representative capacity, cannot be enforced against the property of the decedents, except by the special direction of the court contained

therein. (Co. Civ. Proc. § 1814). In an action against two or more executors or administrators, representing the same decedent, all are considered as one person; and those who are first served with process, or first appear, must answer the plaintiff. Separate answers, by different executors or administrators cannot be required or allowed, except by direction of the court. But this section does not affect the plaintiff's right to bring into court all the executors or administrators who are parties. (Co. Civ. Proc. § 1817). One of two or more executors to whom letters testamentary have not been issued, is not a necessary party to an action or special proceeding, in favor of or against the executors in their representative capacity. (Co. Civ. Proc. § 1818). A temporary administrator appointed under section 2668, of the code of civil procedure, may sue, and he may be sued, by leave of the surrogate in like manner and with like effect, as if he were administrator in chief. (Co. Civ. Proc. § 2672). A foreign executor cannot be sued in his representative capacity in this state upon a cause of action arising out of some transaction had with his testator (*Brown v. Brown*, 1 Barb. Ch. 189; *Flandrow v. Hammond*, 13 App. Div. 325); but his assignee may. (*Petersen v. Chemical Bk.*, 32 N. Y. 21; *Smith v. Tiffany*, 16 Hun, 552). If ancillary letters have been issued to a foreign executor, he may sue or be sued in his representative character in this state. (*Hopper v. Hopper*, 125 N. Y. 400). A foreign executor can sue, in this state, of course, on a contract made with him as such executor. (*Johnson v. Wallis*, 112 N. Y. 230). He may be made a party defendant in an action for an accounting, for assets received in this state. (*Field v. Gibson*, 20 Hun, 274). One co-executor may sue another for an accounting, for an amount due from him to the estate (*Wurtz v. Jenkins*, 11 Barb. 546; *Smith v. Lawrence*, 11 Paige, 206; *Matter of Rumsey*, 45 N. Y. St. Rep. 453); and may maintain an action in equity to compel the payment of a debt (*McGregor v. McGregor*, 35 N. Y. 218; *Rogers v. McGuire*, 75 Hun, 133; *Simpson v. Simpson*, 44 App. Div. 492); but not for damages, for conversion of the property of the testator in his life

time (*Whitney v. Coapman*, 39 Barb. 482); nor for a debt due the estate (*Dean v. Roseboom*, 12 Wk. Dig. 123); nor to foreclose a mortgage made by him. (*Vrooman v. Stimson*, 7 Wk. Dig. 468). One executor cannot sue a firm of which he is a member, to recover a debt due from it to the testator. (*Matter of Consalus*, 95 N. Y. 340). Under chapter 314 of the laws of 1858, an executor or administrator may bring an action to set aside a transfer of real estate by the decedent, as fraudulent as against creditors (*Barton v. Hosner*, 24 Hun, 467); or on the ground of undue influence. (*Love v. Dieskes*, 51 Super. 144). A judgment creditor may also bring such an action. (*Nat. Bk. v. Levy*, 127 N. Y. 549). The executor of a lunatic is a proper party to bring an action for an accounting, against his committee. (*Schultz v. Cookingham*, 30 Hun, 443). An executor may sue a defendant, who in collusion with the plaintiff acting individually, has converted assets of the testator. (*Wetmore v. Porter*, 92 N. Y. 76). An executor who has been removed, is not a necessary party to an action against the trust estate. (*Earle v. Earle*, 48 Super. 18). An executor must be joined as a plaintiff in an action for the price, by the devisee of the vendor, in an executory contract to sell land. (*Adams v. Green*, 34 Barb. 176; *Thompson v. Smith*, 63 N. Y. 301). The executors only, or trustees, can maintain an action for the construction of a will. (*Chipman v. Montgomery*, 63 N. Y. 221). They are the proper parties plaintiff in an action for causing the death of the testator (Co. Civ. Proc. § 1902); and in case the executor or administrator dies while the action is pending, his successor may continue the action. (*Mundt v. Glokner*, 24 App. Div. 110; appeal dismissed, 160 N. Y. 571). The executor or administrator is the proper party plaintiff, for injuries to the testator's real or personal property, or for wrongs to his property rights or interests, in his life time; and is a proper party defendant, in an action for injuries by the testator, to personal or real estate, or wrongs done by him to property or interests, or wrongs which he may have committed, as executor or administrator of some other estate. (2 R. S., 9th Ed., p. 1882).

This includes cases of non-feasance, as well as malfeasance. (*Elder v. Bogardus*, H. & D. Supp. 116). An executor of a deceased partner is not a proper party defendant with the survivor, in an action on a firm debt (*Vorhis v. Childs*, 17 N. Y. 354; *Moore v. Brink*, 4 Hun, 402); nor on a joint and several bond. (*Brown v. Babcock*, 3 How. Pr. 305). An executor or administrator may sue in his own name, to recover for property of the estate sold by him upon credit, or for other contracts made by him (*Thompson v. Whitmarsh*, 100 N. Y. 35); and he, and not the estate, is liable as defendant upon all contracts made after the testator's death. (*Ferrin v. Myrick*, 41 N. Y. 315).

ARTICLE VII.

PUBLIC OFFICERS.

In actions brought against one or more directors, trustees, managers, or other officers of a corporation, to suspend one of them from exercising his office, where it appears that he has abused his trust, or to remove one of the defendants from his office, upon proof or conviction of misconduct, and to procure a new election to be held to supply the vacancy created by such removal, the people are the only proper parties plaintiff. (Co. Civ. Proc. §§ 1781, 1782). And actions against the same officers to compel them to account for their official conduct, in the management and disposition of funds and property committed to their charge, or to compel them to pay to the corporation or to its creditors any money, and the value of any property which they have acquired to themselves, or transferred to others, or lost, or wasted by a violation of their duties, or to set aside an alienation of property made by one or more of the trustees, or other officers of a corporation, contrary to a provision of law, or for a purpose foreign to the lawful business and objects of a corporation, or restraining or preventing such an alienation, where it is threatened, or where there is good reason to apprehend that it will be made, may be brought by the people, or by a creditor

of a corporation, or by an officer having general superintendence of its concerns. (Co. Civ. Proc. §§ 1781, 1782). The people are also the proper parties plaintiff, in actions to dissolve a corporation for the reason stated in section 1785 of the code. (Co. Civ. Proc. § 1786). They are also the proper parties plaintiff, in an action by the attorney general brought to annul a corporation, pursuant to a direction of the legislature (Co. Civ. Proc. § 1797) ; or in actions brought to annul a corporation, for the reasons stated in section 1798 of the code. The following actions must also be brought in the name of the people :

Against a person who usurps, intrudes into, or unlawfully holds or exercises, within the state, a franchise or a public office, civil or military, or an office in a domestic corporation.

Against a public officer, civil or military, who has done or suffered an act which by law, works a forfeiture of his office.

Against one or more persons, who act as a corporation within the state, without being duly incorporated, or exercise within the state, any corporate rights, privileges or franchises, not granted by the law of the state.

Against a foreign corporation which exercises within the state any corporate rights, privileges or franchises, not granted to it by the law of this state; or which within the state, has violated any provision of law, or, contrary to law, has done or omitted any act, or has exercised a privilege or franchise, not conferred upon it by the law of this state, where, in a similar case, a domestic corporation would, in accordance with section 1798 of the code, be liable to an action to vacate its charter and to annul its existence; or which exercises within the state any corporate rights, privileges or franchises in a manner contrary to the public policy of the state. (Co. Civ. Proc. § 1948, Subd. 1, 2, 3, 4). Where real or personal property has been forfeited, or a penalty incurred to the people, or to an officer for their use, the action must be brought in the name of the people. (Co. Civ. Proc. § 1962). Where any money, funds, credits, or other property, held or owned by the state, or held

or owned, officially or otherwise, for or in behalf of a governmental or other public interest, by a domestic municipal, or other public corporation, or by a board, officer, custodian, agency, or agent of the state, or of a city, county, town, village or other division, subdivision, department, or portion of the state, has heretofore been, or is hereafter, without right obtained, received, converted, or disposed of, an action to recover the same, or to recover damage, or other compensation, for so obtaining, receiving, paying, converting, or disposing of the same, or both, may be maintained by the people of the state, in any court of the state having jurisdiction thereof, although a right of action for the same cause exists by law in some other public authority, and whether an action therefor, in favor of the latter, is or is not pending, when the action in favor of the people is commenced. (Co. Civ. Proc. § 1969). Whenever the attorney general has good reason to believe, that the title to, or right of possession of, any real property, has vested in the people of the state, by escheat, or by conviction or outlawry for treason, he must commence an action of ejectment to recover the property. (Co. Civ. Proc. § 1977). Where personal property is forfeited to the people, upon a conviction or outlawry for treason, the attorney general must bring, and may maintain, an action to recover the same, or the value thereof, or such other action, founded upon the forfeiture, as might be maintained by a private person, who had acquired title to the property. (Co. Civ. Proc. § 1982). These actions must be brought in the name of the people.

All state writs must be issued in behalf of the people of the state, but where the writ is awarded upon the application of a private person, it must show that it was issued upon the relation of that person. (Co. Civ. Proc. § 1994). In every case where a person, arrested by virtue of a warrant of attachment, who has given an undertaking, has failed to appear, and the court has directed the undertaking to be prosecuted, if no party is aggrieved by the misconduct of the accused, the action must be brought in the name of the people. (Co. Civ. Proc. § 2290). The people are the only proper parties

plaintiff, in an action to restrain a municipal corporation from acting in violation of its charter, or of duties imposed upon it. (*People v. The Mayor*, 32 Barb. 102; *Davis v. The Mayor*, 14 N. Y. 506). Where property has been devised to one, in trust for charitable corporations, and he repudiates the trust and refuses to apply the money, the attorney general may sue in the name of the people, to establish the trust and for an accounting, if the beneficiaries refuse to take steps to do so. (*Peo. v. Powers*, 83 Hun, 449; reversed on another point, leaving this point undecided in the court of appeals, 147 N. Y. 104). An action may be maintained in the name of the people to restrain the unlawful appropriation of a street. (*People v. The Metropolitan Teleph. Co.*, 31 Hun, 596, 599). They may, as trustees of an express trust, maintain actions upon a surrogate's bond (*People v. Faulkner*, 31 Hun, 317); or on a trustee's bond to them (*People v. Norton*, 9 N. Y. 176); and upon any other statutory bond to them. (*People v. Groat*, 22 Hun, 164). In an action upon a draft, remitted to the state treasurer, by a county treasurer in payment of taxes, the people are the proper parties plaintiff. (*People v. The North American Bank*, 75 N. Y. 547). They are not proper parties, in an action, to redress wrongs inflicted by one powerful combination of citizens against other citizens. (*People v. Albany & Susquehanna R. Co.*, 57 N. Y. 161). Wherever the relief sought involves the right of the state, the people are necessary party defendant. (*Varick v. Smith*, 5 Paige, 137; *Garr v. Bright*, 1 Barb. Ch. 157). The people may be made a party defendant in an action for partition, in the same manner as a private person (Co. Civ. Proc. § 1594), or in any action affecting real property upon which the people have or claim to have a lien under the transfer tax act. (Co. Civ. Proc. § 447). Any state may be a proper party defendant, to enable it to appear if it chooses, and protect its right. (*Garr v. Bright*, *supra*). An action or special proceeding may be maintained, by the trustee or trustees of a school district; the overseer or overseers of the poor of a village, or city; the county superintendent or superintendents of the poor; or the

supervisors of a county, upon a contract, lawfully made with those officers, or their predecessors, in their official capacity; to enforce a liability created, or a duty enjoined, by law, upon those officers, or the body represented by them; to recover a penalty, or a forfeiture, given to those officers, or the body represented by them; or to recover damages for an injury to the property or rights of those officers, or the body represented by them; although the cause of action accrued before the commencement of their term of office. (Co. Civ. Proc. § 1926). An action or special proceeding may be maintained, against any of the officers specified in the last section, upon any cause of action, which accrues against them, or has accrued against their predecessors, or upon a contract made by their predecessors in their official capacity, and within the scope of their authority. (Co. Civ. Proc. § 1927). The last two sections do not apply to a case, where it is specially prescribed by law, that an action may be maintained, by or against the body, represented by an officer designated in those sections; but, in such a case, the prosecution or defense of the action, as the case may be, must be conducted by the persons then in office, who represent that body. (Co. Civ. Proc. § 1928). In an action or special proceeding, brought pursuant to sections 1926 or 1927 above, the officer, by or against whom it is brought, must be described in the summons, and in the subsequent proceeding, by his individual name, with the addition of his official title. (Co. Civ. Proc. § 1929). A county must sue and be sued, in the name of the county. (The County Law, §§ 3, 234). It was formerly held that an action against the sureties of a county treasurer, for misapplying proceeds of the sale of infant's real estate, must be brought in the name of the board of supervisors of the county. (*Supervisors of Tompkins Co. v. Bristol*, 99 N. Y. 316); but section 3 of the County Law would seem to direct that such action be brought in the name of the county. Any action or special proceeding for the benefit of a town, upon a contract lawfully made with any of its town officers, to enforce any liability created or duly enjoined upon those officers, or the town represented by them, or to recover

any forfeiture given to such officers, or the town represented by them, or to recover damages for injury to the property or rights of such officers, or the town represented by them, shall be in the name of the town. Any action or special proceeding to enforce the liability of the town upon any such contract, or for any liability of the town for any act or omission of its town officers, shall be in the name of the town. (The Town Law, § 182). Section 1928 of the code of civil procedure excludes the operation of section 1926 in a case covered by this provision of the Town Law. (*Miller v. Bush*, 87 Hun, 507). In actions by or against the agent of a state prison, he must be a party in his own individual name, with the addition of his official title. (*Agt. State Prison v. Rikeman*, 1 Den. 279). An action to obtain a judgment, preventing waste of, or injury to, the estate, funds, or other property of a county, town, city or incorporated village of the state, may be maintained against any officer thereof, or any agent, commissioner, or other person acting in its behalf, either by a citizen resident therein, or by a corporation who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid a tax therein. This section does not affect any right of action in favor of a county, city, town, or incorporated village, or any public officer. (Co. Civ. Proc. § 1925). In an action brought to vacate an audit of accounts, made by a town board, the persons in favor of whom the audits were made, are necessary parties. (*Osterhoudt v. The Supervisors of Ulster Co.*, 98 N. Y. 239).

ARTICLE VIII.

TRUSTEES OF AN EXPRESS TRUST.

Section 449 of the code of civil procedure, which authorizes trustees of an express trust to sue, does not forbid an action by the beneficiaries, with or without joining the trustee (*Hubbell v. Medbury*, 53 N. Y. 98; *Bort v. Snell*, 39 Hun, 388); but in case the trustee has an interest in the subject-matter, the beneficiary cannot sue, at least, without showing a request to the trustee to

sue and a refusal by him. (*Lord v. Lord*, 68 Hun, 537). If the trustee of an express trust brings an action, however, the beneficiaries are bound thereby although not parties. (*Matter of Straut*, 126 N. Y. 201; *Bracken v. Atlantic Trust Co.*, 36 App. Div. 67). The section does not apply to actions by executors, for the construction of a will. In such an action, all persons claiming under the will must be parties. (*Hobart College v. Fitzhugh*, 27 N. Y. 130). A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section. (Co. Civ. Proc. § 449). It has been held that assignees for the benefit of creditors, or in bankruptcy, are entitled to sue as trustees of an express trust. (*Ogden v. Prentice*, 33 Barb. 160). So of an agent who takes a policy of life insurance in his own name for a known, though unnamed principal. (*Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Weed v. H. B. F. Ins. Co.*, 133 N. Y. 394). Where a policy of life insurance was made payable to the assured or his representatives, for the benefit of a third person, it was held that the personal representatives of the assured might sue upon it, under this section. (*Greenfield v. Mass. Mut. Life Ins. Co.*, 47 N. Y. 430; *Kerr v. Un. Mu. L. I. Ins. Co.*, 69 Hun, 393). The assignee of a life policy, in trust for the wife of the assured, was held to be within this section. (*St. John v. The American Mut. Life Ins. Co.*, 13 N. Y. 31). Where a policy of insurance was issued to a party, payable "to whom it may concern," it was held that the person to whom it was issued, might sue as a trustee of an express trust. (*Walsh v. Washington Ins. Co.*, 32 N. Y. 427). Commission merchants, insuring goods consigned to them to be sold on commission, may sue on the policy as trustees of an express trust. (*Waring v. The Indemnity Fire Ins. Co.*, 45 N. Y. 606). A general agent of an incorporated association, or an officer of a foreign corporation who has authority to sue, is within this section. (*Habicht v. Pemberton*, 4 Sand. 657; *Myers v. Machado*, 6 Abb. Pr. 198). So is an individual banker doing business in his own name, although others are interested with him. (*Burbank v. Beach*, 15 Barb. 326). A mer-

cantile factor, doing business for others in his own name, may sue under this section (*Ludwig v. Gillespie*, 51 Super. 310; *affd.* 105 N. Y. 653); or an auctioneer; or one to whom a contract for the payment of money is assigned in trust (*Cummins v. Barkalow*, 1 Abb. Ct. of App. 479); or one to whom notes have been assigned as collateral security for a loan, made to the assignee by a third party (*Clark v. Titcomb*, 42 Barb. 122); or the agent of a corporation to whom notes are made payable as agent (*Considerant v. Brisbane*, 22 N. Y. 389); or one who has authority of several owners to collect a claim in his own name. (*Noe v. Christie*, 51 N. Y. 270). One of several owners of real estate, who has a power of attorney to lease and collect the rents, can sue for the rents in his own name, under this section. (*Fargo v. Owen*, 79 Hun, 181). Trustees named in a subscription paper, for the purpose of an action against the subscribers, are trustees of an express trust. (*Hutchins v. Smith*, 46 Barb. 235; *Slocum v. Barry*, 34 How. Pr. 320). The general guardian of an infant has been held to be a trustee of an express trust. (*Thomas v. Bennett*, 56 Barb. 197).

ARTICLE IX.

WHERE ONE MAY SUE OR BE SUED FOR ALL.

Where an action is one of a common or general interest of many persons, or where the persons, who might be made parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. (Co. Civ. Proc. § 448). This section applies only to a case where the right to assert which the action is brought, or the obligation it is sought to enforce, exists for or against, or is common to all. (*Reid v. The Evergreens*, 21 How. Pr. 319). The pleading in such cases, must show that the parties are within this section of the code. (*Garner v. Wright*, 24 How. Pr. 144). One of four legatees may sue an executor for an accounting, and all may avail themselves of the decree. (*McKenzie v. L'Amoureux*, 11 Barb. 516). An action may be maintained by one of

the next of kin of a deceased person, on behalf of herself and for the benefit of all the heirs-at-law and next-of-kin, against the representatives of a deceased party to procure an adjudication upon the validity of a will. (*Farnam v. Barnum*, 2 How. Pr. N. S. 396). One judgment creditor may sue in behalf of all, to set aside an assignment for the benefit of creditors as fraudulent. (*Claffin v. Gordon*, 39 Hun, 55). But only those who had a right of action when the suit was commenced, can share in the proceeds of the judgment. (*Ibid.*). One creditor may sue in behalf of all, to compel an assignee for the benefit of creditors to account (*Noyes v. Wernberg*, 15 Wk. Dig. 72); or to compel an executor to account, and to set aside as fraudulent, a lease made by him. (*Petree v. Lansing*, 66 Barb. 357). One creditor may bring an action, in behalf of all, against an insolvent corporation and its stockholders, for an accounting and to ascertain the debts and assets of the corporation, and compel payments on the part of stockholders on account of their personal liabilities. (*Pfohl v. Simpson*, 50 How. Pr. 341). Where several different actions are brought by creditors in behalf of all, the court has power to compel all the creditors to prove their claims in the action in which the judgment is first entered, and to stay proceedings in the other actions. (*Travis v. Myers*, 67 N. Y. 542). One stockholder of a national bank may, in behalf of other stockholders, sue the receivers and directors for misconduct. (*Brinckerhoff v. Bostwick*, 88 N. Y. 52). One stockholder may sue for all, to restrain or set aside fraudulent transactions of the directors, or for damages for such transactions. (*Smith v. Rathbun*, 66 Barb. 402; *Butts v. Wood*, 37 N. Y. 317). One may sue for all, to compel the payment by the corporation, of dividends on the preferred stock. (*Prouty v. Michigan Southern R. R. Co.*, 1 Hun, 655). One member of an unincorporated association may sue for all, under this section. (*Bloete v. Simon*, 19 Abb. N. C. 88; *Strasser v. Moonelis*, 55 N. Y. Super. 197; *affd.* 108 N. Y. 611). One member of a religious corporation may sue the trustees and minister, in behalf of all, to restrain a diversion of the temporalities of the church.

(*First Reformed Church v. Bowden*, 14 Abb. N. C. 356). In all actions brought by one person, in behalf of all others similarly situated, the plaintiff has control of the action, and may discontinue it any time (*Mattison v. Demarest*, 1 Robt. 717; *Derby v. Yale*, 13 Hun, 273; *Hirshfeld v. Fitzgerald*, 157 N. Y. 166); but after judgment, the others may come in and become parties. (*Prouty v. Michigan Southern R. R. Co.*, 1 Hun, 655; *Claflin v. Gordon*, 39 Hun, 54; *Kerr v. Blodgett*, 48 N. Y. 62). If a representative action, as provided for by this section, is fairly brought and honestly and regularly conducted for the benefit of all having the common interest, the judgment therein binds all the class. (*Stevens v. Union Trust Co.*, 57 Hun, 498). Where the action is brought under this section, every member of the same class with the plaintiff, has the right to come in and enjoy the benefits of the action, upon contributing to the expenses of the litigation, although he may have the right to sue in his own name in some other capacity. (*Rogers v. N. Y. & Texas Land Co.*, 17 St. Rep. 131). A person having the same interests as the plaintiff in a suit of this character will not be brought in on his own petition, however, where it appears that, with a knowledge of all the facts, he has acquiesced in the plaintiff's conduct of the litigation until the statute of limitation has run against his right to maintain an independent action. (*MacArdell v. Olcott*, 62 App. Div. 127). But if any of such parties has brought an action for the same relief, and been defeated in it, he cannot obtain the relief under the judgment which has been recovered by another creditor for the benefit of all. (*O'Brien v. Browning*, 11 Hun, 179).

ARTICLE X.

JOINT AND SEVERAL PARTIES.

All persons jointly interested in procuring the relief sought, must be joined as plaintiffs. For instance, all persons entitled to have a deed executed, must be joined as plaintiffs in an action to compel execution. (*Spier v. Robinson*, 9 How. Pr. 325). All who are jointly entitled

to share in a debt may join in an action to recover it (*Brett v. First Universalist Society*, 5 Hun, 149; *Tylee v. McLean*, 10 Wend. 373); but in a case where the defendant made a bond for the payment of four hundred dollars to the heirs of "L," it was held that one of the heirs might sue alone for his share, because his interest was several. (*Hees v. Nellis*, 1 T. & C. 118). Where the interests of two or more promisees are several, although the language of the promise is joint, several actions may be maintained by them. (*Emmeleuth v. H. B. Assc'n.*, 122 N. Y. 130). Separate proprietors of land may join in a suit for redress of a private injury common to all (*Foot v. Bronson*, 4 Lans. 47), as, to restrain an obstruction of a stream which will cause it to overflow the lands of all. (*Gillespie v. Forrest*, 18 Hun, 110). Several owners of a vessel must join or be joined in an action by, or against them. (*Wright v. Marshall*, 3 Daly, 331). Tenants in common must join in all personal actions for injuries to the realty (*DePuy v. Strong*, 37 N. Y. 372; *Eckerson v. Village of Haverstraw*, 6 App. Div. 102; affd. without op. 162 N. Y. 652); but in actions to recover the real estate, each may sue severally (*Hill v. Gibbs*, 5 Hill, 56), or all may join. (Co. Civ. Proc. § 1500). Several taxpayers cannot join in an action to restrain the assessment of a tax, unless they have property in common on which it would be a lien. (*Magee v. Cutler*, 43 Barb. 239). Several owners of lots fronting on the same street cannot join in an action to restrain the construction of a railroad, on the ground that compensation has not been made for damages. (*Moran v. Lydecker*, 27 Hun, 582). If a person is liable to two or more parties on a joint contract and settles with one of them for a part of the claim, the others may sue for their part, without joining the one with whom the settlement has been made. (*Lansing v. Bliss*, 86 Hun, 205). At common law it was a well settled rule, that persons who were jointly and severally liable, must be all sued together, or one of them must be sued separately (*Quigley v. Walter*, 2 Sweeney, 175; *Strong v. Wheaton*, 38 Barb. 616); but this rule was changed by section 454 of the code of civil procedure, which provides that two or

more persons, severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over him, may, all or any of them, be included as defendants in the same action, at the option of the plaintiff. Under this section the plaintiff may sue all, or one, or more than one, at his option (*Field v. Van Cott*, 5 Daly, 308), and the section applies not only to persons severally liable, but to persons who are jointly and severally liable. (*Cridler v. Curry*, 66 Barb. 336; 44 How. Pr. 345). Every written agreement is embraced within this section (*Brainard v. Jones*, 11 How. Pr. 569), but it applies only to written instruments. (*Strong v. Wheaton*, 38 Barb. 616.). An action against a co-partnership, however, upon a contract signed by it, must be brought against all the partners. (*Mayer v. Frankfeld*, 85 Hun, 214). This section only applies where the parties are liable upon the same instrument; and where the liability arises upon separate instruments, the action cannot be brought under this section. (*Leroy v. Shaw*, 2 Duer, 626; *Phalen v. Dingee*, 4 E. D. Smith, 379; *Spencer v. Wheelock*, 11 N. Y. Leg. Obs. 329). Where one defendant signed a sealed contract, and another guaranteed the execution of it by another contract under seal, it was held that they could not be joined under this section (*De Ridder v. Schermerhorn*, 10 Barb. 638; *Allen v. Fosgate*, 11 How. Pr. 218); but the lessee and the surety on the lease who was also a party to the lease, were held to be properly joined as parties defendant pursuant to it; and so the endorser of a promissory note or his executor, can be joined as defendant with the maker of the note. (*Eaton v. Alger*, 47 N. Y. 354). Two makers of a promissory note may be joined under this section, although one signs as surety. (*Hoyt v. Mead*, 13 Hun, 327). Two persons who are charged for having obtained separate property from a testator by undue influence, cannot be joined as defendant, in one action to recover it. (*Decaumont v. Morgan*, 21 W. D. 357). Tort-feasors may be joined, or may be sued separately, at the option of the

plaintiff. (*Creed v. Hartman*, 29 N. Y. 591; *Holt v. Strecker*, 74 Hun, 538; *Clapp v. Town of Ellington*, 87 Hun, 542; *affd.* 154 N. Y. 781). An action, brought under section 454, is in effect, a several action against each defendant (*Parker v. Jackson*, 16 Barb. 33), and the joinder does not affect the right of either defendant to any order, or other relief to which he would have been entitled, if he had been separately sued in an action. (Co. Civ. Proc. § 455). The maker and endorser of a promissory note, joined under this section, are each entitled to an order, changing the place of trial, as if sued separately. (*Sherman v. Gregory*, 42 How. Pr. 481). Defendants thus joined are only separately liable (*Kelsoy v. Bradbury*, 21 Barb. 531; *Farmers' Bank v. Blair*, 44 Barb. 641).

ARTICLE XI.

PROCEEDINGS AGAINST DEFENDANTS SEVERALLY LIABLE.

Where a summons, issued against two or more defendants, alleged to be severally liable, is served upon some, but not upon all of them, the plaintiff may proceed against those upon whom it is served, as if they were the only defendants named therein. Where it is served upon all of them, the plaintiff may take judgment against one or more of them, where he would be entitled to judgment, if the action was against him or them alone. Where judgment is so taken, the clerk must, upon the plaintiff's application, enter an order, directing that the action be severed, and that the plaintiff may proceed against the other defendants. In any subsequent proceeding, the plaintiff may use, together with a certified copy of such an order, a copy of a paper constituting a part of the judgment roll, with like effect as if it was the original. (Co. Civ. Proc. § 456). This section is not restricted to common-law actions on contract. (*Billhofer v. Herbach*, 15 Abb. Pr. 143). Defendants severally liable under this section, are those liable separately from the defendants not served, though jointly as respects each other. (*Pruyn v. Black*, 21 N. Y. 300). In an action against two as partners, upon a promissory

note, where the evidence showed that the note was made by one only, and the other was not a partner, it was held that the plaintiff might recover against the one who made the note. (*Brumskill v. James*, 11 N. Y. 294). So, where a complaint charges a joint liability, that fact does not relieve a defendant if the facts warrant a finding of individual liability. (*Boynton v. Squires*, 85 Hun, 128). Where an action was brought against five, and two only were liable, it was held that the plaintiff might recover against those who were liable. (*McIntosh v. Ensign*, 28 N. Y. 169). An action against several tort-feasors cannot be stricken from the calendar because one of the defendants has not been served, as, under section 456, the plaintiff may proceed against those defendants served, each being severally liable. (*Rappaport v. Werner*, 34 App. Div. 525). Those who are not served, may yet appear in the action. (*Wellington v. Claason*, 9 Abb. Pr. 175). Where the action is against two or more defendants, and a several judgment is proper, the court may, in its discretion, render judgment, or require the plaintiff to take judgment, against one or more of the defendants; and direct that the action be severed, and proceed against the others, as the only defendants therein. (Co. Civ. Proc. § 1205). This section has abrogated the common-law rule that in an action against several defendants upon an alleged joint contract, the plaintiff must fail unless he establishes the joint liability of all the defendants. Where, in such an action, the joint answer of all the defendants denies the joint liability, but sets up facts showing an individual liability of one of the defendants, the plaintiff is entitled to judgment against that defendant, without awaiting the trial of the issue thus joined. (*Stedeker v. Bernard*, 102 N. Y. 327). Sections 454, 455 and 456 of the code of civil procedure do not affect a defense or other objection of a defendant, growing out of the failure to join in the action two or more persons jointly liable; and, as regards the other parties to the action, persons jointly liable are regarded as one party, for every purpose contemplated by those sections. (Co. Civ. Proc. § 457).

ARTICLE XII.

PARTIES IN ACTION RESPECTING REAL ESTATE.

SECTION.

1. Actions of ejectment.
2. Actions for partition.
3. Actions for dower.
4. Actions to foreclose mortgage.
5. Actions to compel determination of claims to real estate.
6. Actions for waste.
7. Actions for a nuisance.

Sec. 1. Actions of Ejectment.

An action of ejectment may be maintained by, or against, an infant (Co. Civ. Proc. § 1686); and the committee of a lunatic or incompetent person may maintain such an action (Co. Civ. Proc. § 2340); and so may the personal representatives, or an assignee, of the lessee for lives. (*Mosher v. Yost*, 33 Barb. 277). It seems that the case of *Burnett v. Bookstaver*, (10 Hun, 481), is superseded by section 2340 of the code above cited. It has been held that where the plaintiff is a lunatic, an action of ejectment in which no equitable relief is demanded, might properly be brought in his own name, although a committee of his person and estate had been appointed. (*Skinner v. Tibbitts*, 13 Civ. Proc. Rep. 370). It was said in the opinion in that case, that the committee could not maintain the action, but that holding was not necessary to the decision of the case. In the case of *Koepke v. Bradley* (3 App. Div. 391; affd. on opinion below, 151 N. Y. 622), it was held that section 2340 permitted the committee of a lunatic to bring an action of partition in his own name, without making the lunatic a party, and the *dictum* in *Skinner v. Tibbitts*, is discredited. Whoever is entitled to the possession of real estate, whether by legal or equitable title, is a proper party plaintiff, in an action of ejectment. (*Clute v. Voris*, 31 Barb. 511; *Phillips v. Gorham*, 17 N. Y. 270; *Sheehan v. Hamilton*, 4 Abb. Ct. App. 211; *Glacken v. Brown*, 39 Hun, 295, 298; *More v. Deyoe*, 22 Hun, 208; *Peck v. Newton*, 46

Barb. 173; *Bennett v. Gray*, 92 Hun, 86). A widow who is guardian in socage of her children, the heirs of a deceased husband, may, in her own name, maintain ejectment for one-third of the land in her own right as devisee, and for two-thirds as guardian of her children. (*More v. Deyoe*, *supra*; *Holmes v. Seely*, 17 Wend. 75; *Cagger v. Lansing*, 64 N. Y. 417). The state is not a proper party plaintiff to recover land belonging to a municipal corporation. (*People v. N. Y. Manhattan Beach Railway Co.*, 84 N. Y. 565). A mortgagee, or his assignee, or other representative, cannot maintain an action of ejectment, to recover the mortgaged premises. (Co. Civ. Proc. § 1498). This rule applies to one claiming under an absolute deed which is in fact a mortgage. (*Shattuck v. Bascom*, 105 N. Y. 39; *Van Vleck v. Enos*, 88 Hun, 348; *Berdell v. Berdell*, 33 Hun, 535; *Carr v. Carr*, 52 N. Y. 251); but a mortgagee in possession with the consent of the owner, may defend an action of ejectment. (*Howell v. Leavitt*, 95 N. Y. 617). A wife who has properly left her husband, leaving him in possession of her land, may sue him for the possession of it. (*Wood v. Wood*, 83 N. Y. 575). A widow cannot maintain ejectment for dower. (Co. Civ. Proc. § 1499). Tenants in common, or joint tenants, may join in ejectment, or one, or more of them may maintain an action, to recover his or their undivided share. (Co. Civ. Proc. § 1500). This section changes the rule laid down in *Hasbrouck v. Bunce*, (62 N. Y. 475). Tenants in common, or joint tenants, are not required to join in an action of ejectment and, if one sues alone, he need not prove, or allege, who his co-tenants are. (*Deering v. Riley*, 167 N. Y. 184). An action of ejectment may be maintained by a grantee, his heir or devisee, in the name of the grantor, or his heir, where the conveyance, under which he claims, is void, because the property conveyed was held adversely to the grantor. The plaintiff must be allowed to prove the facts to bring the case within this section. (Co. Civ. Proc. § 1501). But a grantee can only sue, under this section, in the name of his immediate, and not of a remote grantor. (*Smith v. Long*, 12 Abb. N. C. 113). Two persons, claiming the same land in hostility to each other, cannot join

as plaintiffs. (*Hubbell v. Lerch*, 58 N. Y. 237). Where the complaint demands judgment for the immediate possession of the property, if the property is actually occupied, the occupant thereof must be made defendant in the action. If it is not so occupied, the action must be brought against some person exercising acts of ownership thereupon, or claiming title thereto, or an interest therein, at the time of the commencement of the action. (Co. Civ. Proc. § 1502). If the tenant in possession is not joined as a defendant, a judgment for possession cannot be executed against him, but the action may still proceed against the landlord to establish the title to the premises if he does not set up the non-joinder of the party in possession. (*Clason v. Baldwin*, 129 N. Y. 183). The action may be brought against the actual occupant only. (*Bradt v. Church*, 10 N. Y. 537). The landlord may be brought in, as a person having an interest within the meaning of section 452 of the code of civil procedure in such a case. (*Sand v. Church*, 32 App. Div. 139). If the landlord is not a party, the judgment does not bind him even though he has notice but refuses to come in and defend. (*Bennett v. Leach*, 25 Hun, 178; *Masten v. Olcott*, 101 N. Y. 152, 161). The actual occupants, under this section, are those who claim and hold as against the plaintiff. (*Strong v. The City Brooklyn*, 68 N. Y. 1, 10). If the husband enters, under a deed to himself and wife as joint tenants, both are properly joined as defendants in ejectment (*Stewart v. Patrick*, 68 N. Y. 450); but, if the husband and wife live together on land which is owned by the wife, there is no presumption that he is the actual occupant, and the fact, that the husband lives with her, does not of itself make him either sole or joint occupant. (*Porter v. McGrath*, 41 Super. 84). In such cases, it is always a question of fact which of the two are in possession of the land. (*Martin v. Rector*, 101 N. Y. 77). A railroad company, which has taken possession of a street for its use, is an actual occupant under this section. (*Wager v. Troy Union R. R. Co.*, 25 N. Y. 526). If a church is occupied by a religious society, the corporation, and not the trustees, is the proper defendant. (*Lucas v. Johnson*, 8 Barb. 244). A servant

who actually occupies and possesses the premises, although for his employer, is a proper defendant as exercising acts of ownership upon the premises; but if he does not actually occupy the land, but is only working upon it, he may show, in defense, that he is there merely as servant for another. (*Shaver v. McGraw*, 12 Wend. 558). One claiming to hold under the authority of the United States is a proper party defendant, and, in such an action, the validity of the title of the United States may be adjudged. (*Kaufman v. Lee*, 106 U. S. 196). A parol claim of title is sufficient under section 1502. (*Abeel v. Van Gelder*, 36 N. Y. 513; *Banyer v. Empire*, 5 Hill, 48). In either of the cases specified in section 1502, any person claiming title to, or the right to the possession of, the real property sought to be recovered, as landlord, remainder man, reversioner, or otherwise adversely to the plaintiff, may be joined as defendant in an action therefor. (Co. Civ. Proc. § 1503). This section has changed the rule of the common law, that ejectment could only be maintained against the actual occupant, or one who is exercising acts of ownership, or claiming title or interest in the premises; and since the passage of this act, it has been held that mortgagees, who are purchasers in the foreclosure of their mortgage, were properly joined with their tenant in possession, as defendants in an action of ejectment, by one claiming that the mortgage was void by usury (*More v. Deyoe*, 22 Hun, 208, 217); and also, where a landlord had leased several distinct parcels by separate leases, that the plaintiff might recover against all in one action, if the objection of misjoinder was not taken. (*Fosgate v. Herkimer Manfg. Co.*, 12 N. Y. 580). It was also held since this section, that parties occupying different stories of a building, and with no claim to a lease of the land, were properly joined as defendants. (*Pearce v. Ferris*, 10 N. Y. 280). The landlord may waive the non-joinder of his tenant, and where, upon the service of the summons and complaint, the landlord said that he was in possession, and he lived in the house, it was held that he was estopped from denying that he was in the actual possession of the premises. (*Finnegan v. Carraher*, 47 N. Y.

493). One who is in wrongful possession under the other defendants, is a proper defendant. (*Rank v. Levinus*, 5 Civ. Proc. Rep. 368).

Sec. 2. Actions for Partition.

Where two or more persons hold and are in possession of real property, as joint tenants, or as tenants in common, in which either of them has an estate of inheritance, or for life, or for years, any one or more of them may maintain an action for the partition of property, according to the respective rights of the persons interested therein; and for a sale thereof, if it appears that a partition thereof cannot be made, without great prejudice to the owners. (Co. Civ. Proc. § 1532). Where two or more persons hold, as joint tenants, or as tenants in common, a vested remainder or reversion, any one or more of them may maintain an action for the partition of the real property to which it attaches, according to their respective shares therein, subject to the interest of the person holding the particular estate therein. (Co. Civ. Proc. § 1533). Since the passage of the code of civil procedure, the case of *Sullivan v. Sullivan* (66 N. Y. 37), is no longer the law. An action for the partition of real property shall not be brought by an infant, except by the written authority of the surrogate of the county in which the property, or a part thereof, is situated. The authority shall not be given, unless the surrogate is satisfied, by affidavit or other competent evidence, that the interests of the infant will be promoted by bringing an action. A judgment for a partition or sale shall not be rendered in such an action, unless the court is satisfied that the interests of the infant will be promoted thereby, and that fact is expressly recited in the judgment. (Co. Civ. Proc. § 1534). An action by an infant without leave is irregular, and the purchaser, in such an action, will not be compelled to take the land. (*Struppman v. Muller*, 52 How. Pr. 211). A trustee of land to receive the rents and profits and apply them to the use and support of an infant, until his majority, with an absolute power to sell the land and invest the profits, and having possession, may bring partition (*Gallie v. Eagle*, 65 Barb. 583); but a *cestui que trust* cannot maintain it.

(*Harris v. Larkin*, 22 Hun, 428; *Morse v. Morse*, 85 N. Y. 53). An action of partition may be maintained by the committee of a lunatic without making the lunatic a party. (Co. Civ. Proc. § 2340; *Koepke v. Bradley*, 3 App. Div. 391; *affd.* on opinion below, 151 N. Y. 622). An assignee in a bankruptcy of a tenant in common, may maintain partition (*Rutherford v. Hewey*, 59 How. Pr. 231), and so may an assignee for the benefit of creditors. (*Van Arsdale v. Drake*, 2 Barb. 599). It was held in *Powelson v. Reeve* (2 Wk. Dig. 375), that an action could be maintained by a receiver in supplementary proceedings, who had acquired title in the real estate of the judgment debtor, but in the cases of *Dubois v. Cassidy* (75 N. Y. 298, 302), and *Miller v. Levy* (46 Super. 207), it was thought by the court that such a receiver could not maintain the action, although, in none of those cases, was it necessary to decide the question. But in a later case of *Payne v. Becker*, it was conceded by counsel and by the court, that the receiver in supplementary proceedings had not such a title as would enable him to maintain partition. (22 Hun, 28, 32; 87 N. Y. 153). One whose interest in the property was only the proceeds of what might be derived upon the sale by executors, cannot maintain this action. (*Davies v. Davies*, 15 Wk. Dig. 118). One tenant in common of leasehold estate, may bring an action for partition (*Walther v. Regnault*, 56 Hun, 560), and a tenant by the courtesy of an undivided share of real estate, may maintain the action (*Tilton v. Vail*, 53 Hun, 324), but where he is the tenant by the courtesy of the whole interest in the property, and other persons are tenants in common of the estate in remainder only, he cannot bring the action. (*Reed v. Reed*, 46 Hun, 212; 107 N. Y. 545). If, however, he does sue, and judgment is rendered in the action without objection, the judgment is valid and conclusive upon the parties. (*Reed v. Reed*, *supra*). A tenant in common may join his wife as a co-plaintiff. (*Foster v. Foster*, 38 Hun, 365). A person claiming to be entitled as a joint tenant or a tenant in common, by reason of his being an heir of a person who died, holding and in possession of real property, may maintain an action for the

partition thereof, whether he is in or out of possession, notwithstanding an apparent devise thereof to another by the decedent and possession under such a devise. But in such an action, the plaintiff must allege and establish that the apparent devise is void. (Co. Civ. Proc. § 1537. See, for a discussion of these sections, *Garvey v. Union Trust Co.*, 29 App. Div. 513). Every person having an undivided share, in possession, or otherwise, in the property, as tenant in fee, for life, by the courtesy, or for years, every person entitled to the reversion, remainder, or inheritance of an undivided share, after the determination of a particular estate therein; every person, who, by any contingency contained in a devise or grant, or otherwise, is or may become entitled to a beneficial interest in an undivided share thereof; every person having an inchoate right of dower in an undivided share in the property, and every person having a right of dower in the property, or any part thereof, which has not been admeasured, must be made a party to an action for partition. But no person, other than a joint tenant, or a tenant in common of the property, shall be a plaintiff in the action. In a partition action, the executors or administrators and creditors of a deceased person, who, if living, should be a party to said action, must be made parties defendant. In case no executors or administrators have been appointed, that fact should be alleged, and if the complaint in such action alleges, and it is made to appear by proof that there are unpaid debts of said deceased payable out of his estate, the premises sought to be partitioned may be sold free from such debts, and the money produced by such sale shall be brought into court, and the same, or so much thereof as may be necessary, shall be used for the payment of such debts in the same manner as debts of a deceased person are paid from the proceeds of sale of real estate in the surrogate's court. And the court in which the said action is brought may proceed to ascertain such debts and direct their payment from such proceeds; or such court may direct the same to be administered as if the sale of such interest in said land had been made upon the decree of such surrogate. (Co. Civ. Proc. §

1538). Devisees who take a contingent fee, limited upon a prior devise in fee, are necessary defendants in the action, although the owners of the prior estate are still living. (*Nellis v. Nellis*, 99 N. Y. 505). Persons who are entitled to a remainder in fee of real property, devised in trust with directions to convey to them, are necessary parties defendant. (*Moore v. Appleby*, 108 N. Y. 237; *Campbell v. Stokes*, 142 N. Y. 23). An executor having the power of sale, which has become extinguished by the act of the beneficiaries, is not a necessary party defendant. (*Prentice v. Janssen*, 79 N. Y. 478). The husband of a woman, who is a tenant in common of real estate, is not a necessary or proper party to the action. (*Barnes v. Blake*, 59 Hun, 371). The plaintiff may, at his election, make a tenant by the courtesy, for life or for years, of the entire property, or whoever may be entitled to a contingent or vested remainder or reversion in the entire property, or a creditor, or other person, having a lien or interest which attaches to the entire property, a defendant in the action. In that case, the final judgment may either award to such a party his or her entire right and interest or the proceeds thereof, or where the right or interest is contingent, direct that the proceeds or share thereof be substituted for the property and invested for whoever may eventually be entitled thereto; or may reserve and leave unaffected his or her right and interest, or any portion thereof. A person specified in this section, who is not made a party, is not affected by the judgment in the action. (Co. Civ. Proc. § 1539). A woman who claims dower, as the widow of the ancestor of the tenants in common, may be made a party to the action of partition, and her claim of dower may be tried and disposed of in the action. (*Spliss v. Meyer*, 36 St. Rep. 227; 13 Supp. 70). Not only a person who actually has a lien or interest in the property in question but one who apparently has, or claims to have a lien or interest in the property sought to be partitioned may be made a party. (*Best v. Zeh*, 82 Hun, 232; affd. 146 N. Y. 363; *Bender v. Terwilliger*, 48 App.Div.371; affd. without op., 166 N.Y.590). A general lien upon land, or a title paramount to the tenants

in common, is not cut off by the suit between the tenants in common, and such lienor or owner is not a necessary party. (*Canfield v. Ford*, 28 Barb. 336; *Mead v. Jenkins*, 29 Hun, 253). If creditors having paramount liens are made parties, the court may determine the amount and validity of the lien. (*Barnard v. Onderdonk*, 98 N. Y. 158; *Townshend v. Townshend*, 1 Abb. N. C. 81). The plaintiff may, at his election, make a creditor, having a lien on an undivided share or interest in the property, a defendant in the action. In that case, he must set forth the nature of the lien, and specify the share or interest to which it attaches. If partition of the property is made, the lien, whether the creditor is or is not made a party, shall thereafter attach only to the share or interest assigned to the party upon whose share or interest the lien attached; which must be first charged with its just proportion of the costs and expenses of the action, in preference to the lien. (Co. Civ. Proc. § 1540). Where a defendant having a share or interest in the property is unknown, or where his name or part of his name is unknown, and the summons is served upon him by publication, or without the state, pursuant to an order for that purpose, as prescribed in article second of title first of chapter fifth of this act, the notice subjoined to the copy of the summons as published, or served therewith, must, in addition to the matters required in that article, state briefly the object of the action, and contain a brief description of the property. (Co. Civ. Proc. § 1541). This last section substantially annuls the law as laid down in *Sandford v. White*, (56 N. Y. 359).

Sec. 3. Actions for Dower.

Where the property, in which dower is claimed, is actually occupied, the occupant thereof must be made defendant in the action. Where it is not so occupied, the action must be brought against some person exercising acts of ownership thereupon, or claiming title thereto, or an interest therein, at the time of the commencement of the action. (Co. Civ. Proc. § 1597). Where the action is brought against heirs to recover

dower and for account and payment of rents and profits, all the heirs are necessary parties. (*Van Name v. Van Name*, 23 How. Pr. 247). Those who have no personal interest in the land affected, are not necessary parties. (*O'Connor v. Garrigan*, 17 Wk. Dig. 302). In either of the cases specified in section 1597, any other person, claiming title to, or the right to the possession of, the real property in which dower is claimed, may be joined as defendant in the action. (Co. Civ. Proc. § 1598). In an action to recover dower, in a distinct parcel of real property of which the plaintiff's husband died seized, or in all the real property which he aliened by one conveyance, all the persons in possession of, or claiming title to, the property, or any part thereof, may be made defendants, although they possess or claim title to different portions thereof in severalty. (Co. Civ. Proc. § 1599).

Sec. 4. Actions to Foreclose Mortgage.

A *bona fide* assignee of a mortgage given for a transfer of land may foreclose the mortgage, although the transfer has been adjudged void as against creditors. (*Smart v. Bement*, 4 Abb. Ct. App. 253). The assignee of a foreign executor may sue to foreclose the mortgage. (*Smith v. Tiffany*, 16 Hun, 552). If there is no bond, the mortgage is the only security, and the only evidence of the debt, and the assignee of it can maintain the action to foreclose. (*Carpenter v. O'Dougherty*, 67 Barb. 397). But where a bond is given to accompany the mortgage, the bond is the principal debt, and the one who is assignee of the mortgage but not of the debt cannot maintain an action for foreclosure of the mortgage. (*Cooper v. Newland*, 17 Abb. Pr. 342; *Merritt v. Bartholick*, 36 N. Y. 44). If the mortgage is assigned as collateral security, the assignor may sue, but the assignee must be a party, either plaintiff or defendant. (*Simson v. Satterlee*, 6 Hun, 305; *affd.* 64 N. Y. 657). A junior mortgagee may foreclose, although the foreclosure of the prior mortgage has proceeded to judgment. (*Bache v. Purcell*, 6 Hun, 518). The heirs of a deceased mortgagee are not proper plaintiffs in an action to foreclose. (*Shaw v. McNish*, 1 Barb. Ch. 326). Where the administrator of the

wife of a mortgagee was entitled to the interest on the mortgage, and the executor of the mortgagee refused to collect it, it was held that the administrator of the wife might bring an action to foreclose the mortgage. (*Weed v. Hornby*, 35 Hun, 580). The mortgagee or the owner of the mortgage, and the mortgagor and those who have acquired rights under him, are the only necessary parties to the foreclosure (*Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127); but all parties who have liens on the equity of redemption subsequent to the mortgage, and junior mortgagees and their personal representatives, are necessary parties within this rule. (*Morris v. Wheeler*, 45 N. Y. 708; *Benjamin v. E. J. & C. R. R. Co.*, 54 N. Y. 675; *German Savings Bank v. Muller*, 10 W. D. 67). If a junior mortgage is recorded, the owner of it is a necessary party, although the mortgage is not indexed. (*Mut. Life Ins. Co. v. Dake*, 1 Abb. N. C. 381; affirmed, 87 N. Y. 257). A remainder man under the will of the mortgagor is a necessary party defendant. (*Leggett v. Mut. Life Ins. Co.*, 64 Barb. 23; *Levy v. Levy*, 79 Hun, 290). An assignee for the benefit of creditors of the owner of the equity is a proper and sufficient party defendant for the purpose of cutting off such interest. (*Julien v. Lalor*, 47 Hun, 164). Where an assignee in bankruptcy of the mortgagee acquired title, after the filing of a notice of pendency of action, he was held not to be necessary party defendant (*Wagner v. Hodge*, 34 Hun, 524); but, if the suit is commenced after the bankruptcy, the suit must be brought against the assignee in his official capacity. (*Landon v. Townshend*, 112 N. Y. 93). A municipal corporation which has taken for public use, a part of the lands covered by the mortgage, is not a necessary party in an action to foreclose it. (*Hooker v. Martin*, 10 Hun, 302). A mortgagor who has conveyed the premises is not a necessary party in an action to foreclose the mortgage (*Bigelow v. Bush*, 6 Paige, 343); unless relief is sought against him. (*Walton v. James*, 11 Wk. Dig. 508). Nor are the heirs of the mortgagor necessary parties in such a case. (*Daly v. Burchell*, 13 Abb. Pr. N. S. 264). A mortgagor whose equity of redemption has been sold on execution, or

whose time to redeem has not elapsed, is a necessary party to foreclose the mortgage. (*Hallock v. Smith*, 4 Johns. Chan. 649). The wife of mortgagor is a necessary party, if she has joined in the mortgage (*Mills v. Van Voorhies*, 20 N. Y. 412); but if she did not join in the mortgage, she is not a necessary party, and she is not bound by the judgment. (*Barker v. Burton*, 67 Barb. 458). If the mortgage has been assigned as security, the assignor is a necessary party in an action brought by the assignee to foreclose it (*Kittle v. Van Dyck*, 1 Sand. Chan. 76); and so is the assignee for the benefit of the creditors of the assignee. (*Bard v. Poole*, 12 N. Y. 495). An assignee of the mortgagee for the benefit of creditors, may foreclose without making the mortgagee a party. (*Christie v. Herrick*, 1 Barb. Chan. 254). Where a mortgagee bequeathed the mortgage to his executor, with directions to invest the proceeds of it for certain persons, with remainders over, the remainder men are not necessary parties defendant in an action to foreclose a prior mortgage, but the lien of the junior mortgage is barred if the executor is made a party. (*Lockmen v. Reilly*, 95 N. Y. 64). Any person, who is liable to the plaintiff for the payment of the debt secured by the mortgage, may be made a defendant in the action; and if he has appeared, or has been personally served with the summons, the final judgment may award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein. The people of the state of New York may be made a party defendant to an action for the foreclosure of a mortgage on real property, where the people of the state of New York have a lien on the said real property, subsequent to the lien of the mortgage sought to be foreclosed in said action, in the same manner as a private person. (Co. Civ. Proc. § 1627). The guarantor of a mortgage debt, although only conditionally liable, may be made a party defendant (*Vanderbilt v. Schreyer*, 91 N. Y. 392); and so may the personal representatives of the mortgagor, or of a guarantor of the mortgage (*Glacius v. Fogel*, 88 N. Y. 434), but not

the heirs or devisees. (*Leonard v. Morris*, 9 Paige, 90). A person who claims dower by title paramount to the mortgage, can not be brought into court in an action to foreclose the mortgage, and compelled to litigate the validity of her claim. (*Nelson v. Brown*, 144 N. Y. 384); nor can one who claims adversely to the mortgagor. (*Dumond v. Church*, 4 App. Div. 194). A prior mortgagee is a proper party, but is not a necessary party. (*Smith v. Davis*, 4 Civ. Pro. Rep. 158). But where one claiming a right under the mortgagor prior to the mortgage is made a party defendant, the amount due to him, or the question of priority of his lien, may be settled in the action (*Brown v. Volkening*, 64 N. Y. 76); though he makes default. (*Johnson v. Mickle*, 144 N. Y. 237). If the bond is executed by the mortgagor and another, it is proper to make both obligors defendants, and to ask judgment for a deficiency against both. (*Thorne v. Newby*, 59 How. Pr. 120).

Sec. 5. Action to Compel the Determination of a Claim to Real Property.

Where a person has been, or he and those whose estate he has, have been for one year in possession of real property, or of any undivided interest therein, claiming it in fee, or for life, or for a term of years not less than ten, he may maintain an action against any other person to compel the determination of any claim adverse to that of the plaintiff which the defendant makes to any estate in that property in fee, or for life, or for a term of years not less than ten, in possession, reversion or remainder, or to any interest in that property, including any claim in the nature of an easement therein, whether appurtenant to any other estate or lands or not, and also including any lien or incumbrance upon said property, of the amount or value of not less than two hundred and fifty dollars. But this section does not apply to a claim for dower. (Co. Civ. Proc. § 1638). To enable the plaintiff to maintain this action, he need not have a valid title, if he claims such a title as the code requires (*Ford v. Belmont*, 69 N. Y. 567; *Schroeder v. Gurney*, 10 Hun, 413), but he must for the required length of

time have been in actual possession, or possession in fee. (*Churchill v. Underdonk*, 59 N. Y. 134). Proof of possession in the plaintiff under claim of title, for the length of time required by the statute, is sufficient to require the defendant to prove his title. (*Stackhouse v. Stotenbur*, 22 App. Div. 312). Constructive possession alone, although under a legal title, is not enough. (*Boylston v. Wheeler*, 61 N. Y. 521; *Van Wagenen v. Botsford*, 13 Wk. Dig. 381). Possession under an agreement to purchase the fee is sufficient. (*Brown v. Crabb*, 156 N. Y. 447). Possession of a tenant, however, is sufficient to enable the landlord to maintain the action. (*King v. Townshend*, 78 Hun, 380). The occupation of two floors in a large building is a sufficient possession. (*Diefendorf v. Diefendorf*, 132 N. Y. 100). A remainder man to whom the life tenant has conveyed, may maintain this action. (*Barron v. Martense*, 4 Albany Law Jour. 93).

Sec. 6. Actions for Waste.

An action for waste may be maintained by the owner of land, or by a remainder man, or reversioner, for damages to the inheritance. (*Purton v. Watson*, 19 N. Y. St. Rep. 6). An heir or devisee may maintain an action for waste, committed in the time of his ancestor or testator, as well as in his own time. The grantor of a reversion may maintain an action for waste, committed before he aliened the same. (Co. Civ. Proc. § 1652). Such an action may also be maintained against a guardian by his ward, either before or after the termination of the guardianship, for waste, committed upon the real property of the ward, during the guardianship. (Co. Civ. Proc. § 1653). Where real property is sold by virtue of an execution, the person, to whom a conveyance is executed pursuant to the sale, may maintain an action for waste, committed thereon after the sale, against the person, who was then in possession of the property. (Co. Civ. Proc. § 1654). An action for waste may also be maintained, by a joint tenant, or tenant in common, against his co-tenant, who commits waste upon the real property held in joint tenancy or in common. (Co. Civ.

Proc. § 1656). An action for waste may also be maintained by one who has an equitable contingent interest in the lands. (*Lee v. Whallon*, 20 Wk. Dig. 366). An action may be maintained against a tenant by the courtesy, in dower, for life or for years, or the assignee of such a tenant, who, during his estate or term, commits waste upon the real property held by him, without a special and lawful written license so to do; or against such a tenant, who lets or grants his estate, and, still retaining possession thereof, commits waste without a like license. (Co. Civ. Proc. § 1651). In an action by a remainder man, the owner of the intervening life estate is not a necessary party. (*Van Deusen v. Young*, 29 N. Y. 9).

Sec. 7. Action for a Nuisance.

The people alone can maintain an action to abate a public nuisance. (*People v. Vanderbilt*, 26 N. Y. 287; *People v. Metropolitan Telephone Co.*, 31 Hun, 596; *Knickerbocker Ice Co. v. Schultz*, 116 N. Y. 382). But where the public nuisance is great, a very slight special injury is sufficient to give a right of action to a private person. (*Flynn v. Taylor*, 53 Hun, 167). The board of health of the city of New York may maintain actions to abate nuisances within the city. (Greater New York Charter, § 1288). A municipal corporation, which has control or supervision of the streets, may maintain action to abate nuisances upon them. (2 Dillon on Mun. Corp. § 659; *Trustees of Watertown v. Cowen*, 4 Paige, 510). A private person can maintain an action to abate a public nuisance, and for damages, if he suffers any special injury from it (*Francis v. Shoellkopf*, 53 N. Y. 152; *Crooke v. Anderson*, 23 Hun, 266), but not otherwise. (*Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44). A person by whom the nuisance has been erected, and a person to whom the real property has been transferred, may be joined as defendants in such an action. (Co. Civ. Proc. § 1661).

ARTICLE XIII.

WHERE THE DEFENDANT OR HIS NAME IS UNKNOWN.

Where the plaintiff is ignorant of the name or part of the name of a defendant, he may designate that defendant, in the summons, and in any other process or proceeding in the action, by a fictitious name, or by as much of his name as is known, adding a description, identifying the person intended. Where the plaintiff demands judgment against an unknown person, he may designate that person as unknown, adding a description, tending to identify him. In either case, the person intended is thereupon regarded as a defendant in the action, and as sufficiently described therein, for all purposes, including service of the summons. When the name, or the remainder of the name, or the person, becomes known, an order must be made by the court, upon such notice and such terms as it prescribes, that the proceedings already taken be deemed amended, by the insertion of the true name, in place of the fictitious name, or part of a name, or the designation as an unknown person; and that all subsequent proceedings be taken under the true name. (Co. Civ. Proc. § 451). This section applies to actions for partition. (*Bergen v. Wyckoff*, 84 N. Y. 659). A fictitious name can only be used, when the plaintiff is actually ignorant of the true name. (*Crandall v. Beach*, 7 How. Pr. 271; *Gardner v. Kraft*, 52 How. Pr. 499). There must be an allegation in the complaint that the fictitious name or description is so used because the plaintiff is ignorant of the true name. (*Gardner v. Kraft*, *supra*). A fictitious name or description cannot be used to cover a case of one whose name is known, but whom it is not intended to sue, unless it is discovered that he is a necessary party defendant. (*Town of Hancock v. First National Bank*, 93 N. Y. 82). When the name of the defendant is unknown, a description is sufficient. (*Pindar v. Black*, 4 How. Pr. 95; *Weil v. Martin*, 24 Hun, 645). In case the plaintiff knows the real name of the defendant, the method of taking advantage of the irregularity is to

move to set aside all proceedings taken since the acquisition of such knowledge. (*Peo. ex rel. Maibach v. Dunn*, 38 App. Div. 112). If one executes an instrument, using only the initials of his name, he may be sued by the name he uses. (*Farmers' Nat. Bk. v. Williams*, 9 Civ. Pro. R. 212).

ARTICLE XIV.

INFANT PLAINTIFFS AND DEFENDANTS.

Before a summons is issued in the name of an infant plaintiff, a competent and responsible person must be appointed to appear as his guardian for the purpose of the action who shall be responsible for the costs thereof, except where such infant prosecutes as a poor person as provided for under section 459 of this act, in which case security for costs shall not be required. (Co. Civ. Proc. § 469). An infant defendant must also appear by guardian. (Co. Civ. Proc. § 471). The guardian *ad litem* of an infant, must be a competent and responsible person, fully competent to understand and protect the rights of the infant; who has no interest adverse to his, and is not connected in business with the attorney or counsel of the adverse party, and who has sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the defense or prosecution of the suit. (Co. Civ. Proc. § 471. General Rule 49). If one who is a plaintiff, although in a representative capacity, and having no personal interest in the action, is appointed a guardian *ad litem* for an infant defendant, it will be a fatal irregularity. (*Hecker v. Sexton*, 43 Hun, 593). Under the old practice, it was held that no one would be appointed guardian of an infant, unless he was worth at least \$250, over and above all his debts. (*Robertson v. Robertson*, 3 Paige, 387). Where a father petitioned to be appointed guardian *ad litem* for his daughter, and set forth that he had a wife and five children to support; that he earned two dollars a day, and that neither he nor his children had any relative or friend of greater means than himself, who would assume the position; it was held that

he was not a person of sufficient pecuniary ability to entitle him to be appointed. (*Matter of Mang*, 50 Super. 96). The objection that the guardian of an infant plaintiff is irresponsible must be raised by the defendant and as soon as he learns of the appointment. (*Wice v. Com'l Ins. Co.* 7 Daly, 258). A person named by an adverse party, cannot be appointed a guardian *ad litem*. (General Rule 49). 'An order appointing a guardian *ad litem*, nominated by an adverse party, must be vacated on motion of the infant's general guardian (*Matter of Cutting*, 38 App. Div. 247); and any decree rendered under the appointment of a guardian, so nominated, must be reversed on the appeal of the general guardian. (*Matter of Cutting*, 38 App. Div. 252). It does not invalidate the appointment that the person named is a relative of the judge who makes it. (*Matter of Van-Wagonen*, 69 Hun, 365). An attorney or officer of the court must act as the guardian of any infant defendant, whenever appointed for that purpose by the court. (Co. Civ. Proc. § 472; General Rule 50). No person, other than the clerk, shall be appointed guardian *ad litem*, unless his written consent, duly acknowledged, is produced to the court or judge, making the appointment. (Co. Civ. Proc. § 472). An application for the appointment of a guardian *ad litem* for an infant plaintiff, must be made by the infant, if he is of the age of fourteen or upwards; or, if he is under that age, it must be made by his general or testamentary guardian, if he has one, or by a relative or friend. If the application is made by a relative or friend, notice thereof must be given to his general or testamentary guardian, if he has one; or, if he has none, to the person with whom the infant resides. (Co. Civ. Proc. § 470). An application for the appointment of a guardian *ad litem* for an infant defendant must be made by the infant if he is of the age of fourteen years, or upwards, and applies within twenty days after the personal service of the summons, or after the service by publication is complete; or, if he is under that age, or neglects so to apply, the application may be made by any other party to the action, or by a relative or friend of the infant. Where the application is made by a person,

other than the infant, notice thereof must be given to his general or testamentary guardian, if he has one within the state, or, if he has none, to the infant himself, if he is of the age of fourteen years, or upwards, and within the state; or, if he is under that age, and within the state, to the person with whom he resides. (Co. Civ. Proc. § 471). The application may be made by the general guardian appointed for an infant in another state (*Freund v. Washburn* 17 Hun, 543), or by the committee of a non-resident infant lunatic. (*Rogers v. M'Lean*, 11 Abb. Pr. 440). An application for the appointment of the guardian *ad litem* for an infant defendant cannot be made until the summons has been served (Co. Civ. Proc. § 471; *Ingersoll v. Mangan*, 84 N. Y. 622), nor where service has been made under an order of publication upon the infant, until such service is complete (*Crouter v. Crouter*, 133 N. Y. 55; *Darrow v. Calkins*, 154 N. Y. 503), except in a case prescribed in section 473 where the infant defendant resides out of the state, or resides within the state but is temporarily absent therefrom. (*Gotendorf v. Goldschmidt*, 83 N. Y. 110). Where the adverse party applies for the appointment of the guardian *ad litem*, the application cannot be made until twenty days after service of the summons is complete. If the appointment is made upon such an application, previous to that time, the judgment may be vacated. (*Keyes v. Ellensohn*, 72 Hun, 392; appeal dismissed, 141 N. Y. 551). Subdivision 2 of section 116 of the code of procedure contained a provision for the appointment of a guardian *ad litem* for a non-resident infant defendant, in actions for foreclosure or partition, but that provision has not been retained in the code of civil procedure. There are now no especial provisions in regard to the appointment of guardians *ad litem*, except that in an action of partition, he must be appointed by the court. Section 471 of the code of civil procedure, which has been held to forbid the appointment of a guardian *ad litem* for an infant defendant, until the service of summons upon him, now applies to all cases except those mentioned in section 473. Yet it

has been held in *Schrivcr v. Schriver* (12 Wk. Dig. 328; affd. 86 N. Y. 575 without a discussion of this point) that the appointment of a guardian *ad litem* for a non-resident infant defendant over fourteen years old, upon his petition with an appearance and answer by the guardian *ad litem*, is sufficient to give jurisdiction to the court without service of the summons. Where notice is required of the application for the appointment under sections 470 and 471, it must be eight days (five days where the attorneys for the respective parties reside or have their offices in the same city or village), if served personally, or double that time if served by mail. (Co. Civ. Proc. §§ 780, 798; General Rule 37). In an action of partition, the application must be made to the court, which only can appoint a guardian *ad litem* (Co. Civ. Proc. § 1535); but in any other case the application may be made to the court, or to a judge thereof, or, if the action is brought in the supreme court, to the county judge of the county where the action is tried. (Co. Civ. Proc. § 472). The application should state the age of the infant, whether or not he has a general or testamentary guardian, and who he is; if not, with whom he resides: if made by, or in behalf of the plaintiff, that he is about to bring an action, stating the court in which he proposes to bring it, the name or names of the defendant or defendants, and the object of the action. If it is made by, or in behalf of a defendant, the application should state the name of the plaintiff, the object of the action, and the court in which it was brought, and also the time the summons was served upon him. Where the application is made by the infant, or some one in his behalf, it should also state the name of the person proposed as guardian *ad litem*, and that he is a competent and responsible person. (*McDonald v. The Brass Goods Manfg. Co.*, 2 Abb. N. C. 434). The application must also show that the person proposed as guardian is competent to understand and protect the rights of the infant; that he has no interests adverse to those of the infant; and is not connected in business with the attorney or counsel for the adverse party. (General Rule 49). It should be verified, and it should be accompanied by the consent of the

party proposed to serve, unless the clerk is to be appointed, and this consent should be in writing and duly acknowledged. (Co. Civ. Proc. § 472). If the consent is not so acknowledged, the appointment is irregular. (*Cole v. McGarvey*, 6 Civ. Proc. Rep. 305). Where an infant defendant resides out of the state, or resides within the state, and is temporarily absent therefrom, the court may, in its discretion, make an order designating a person to be his guardian *ad litem*, unless he, or some one in his behalf, procures such a guardian to be appointed, as prescribed in the last two sections, within a specified time after service of a copy of the order. The court must give special directions in the order, respecting the service thereof, which may be upon the infant. The summons may be served by delivering a copy to the guardian so appointed, with like effect as where summons is served without the state upon an adult defendant, pursuant to an order for that purpose, granted as prescribed in section four hundred and thirty-eight of the code of civil procedure; except that the time to appear or answer is twenty days after the service of the summons, exclusive of the day of service. (Co. Civ. Proc. § 473). To authorize the appointment of a guardian *ad litem* under this section the serving papers must set forth the facts justifying the court in making the order. (*Smith v. Reid*, 134 N. Y. 568). Directions which are made by the court pursuant to this section, as to the service of the order, can not be modified by a judge out of court, and any such modification is void. (*Uhl v. Loughran*, 22 St. Rep. 489; 4 Supp. 827). The security to be given, by the guardian *ad litem* for an infant party, in an action for partition, must be a bond, to the people of the state, executed by him and one or more sureties, as the court directs, in a sum fixed by the court, conditioned for the faithful discharge of the trust committed to him as guardian, and to render a just and true account of his guardianship, in any court or place, when thereunto required. The bond must be filed with the clerk, before the guardian enters upon the execution of his duties; and it cannot be dispensed with, although he is the general guardian of the infant. (Co. Civ. Proc.

§ 1536). It was held before 1884, that the bond under this section must be given to the county treasurer (*McLaughlin v. Crawford*, 18 Wk. Dig. 314), but that was changed by an amendment in 1884. The clerk will be required to give security like any other person. (*Fisher v. Lyon*, 34 Hun, 183). The omission to require a bond from the guardian *ad litem* is a mere irregularity and does not divest the court of jurisdiction. (*Reed v. Reed*, 46 Hun, 212; *affd.* on other grounds, 107 N. Y. 545; *Fox v. Fee*, 24 App. Div. 314; *Croghan v. Livingston*, 17 N. Y. 218). Except in a case where it is otherwise specially prescribed by law, a guardian, appointed for an infant, shall not be permitted to receive money or property of the infant, other than costs and expenses allowed to the guardian by the court, until he has given sufficient security, approved by a judge of the court, or a county judge, to account for and apply the same under the direction of the court. (Co. Civ. Proc. § 474; General Rule 51). The security must be a bond to the infant, in such penalty as the judge directs, not less than twice the sum, or the value of the property to be received, executed by the guardian and at least two sureties approved by the judge, and filed in the office of the clerk. The infant, or any other party to the action, may afterwards apply for an order, directing a new bond to be given, with an increased penalty; or the court may so direct, of its own motion. (Co. Civ. Proc. § 475). If the court has jurisdiction, a failure to appoint a guardian *ad litem* for an infant plaintiff, is an irregularity only (*Rima v. R. I. Works*, 120 N. Y. 433), and it may be waived (*Woldford v. Oakley*, 1 Shel. 261), and it is waived by pleading to the merits. (*Parks v. Parks*, 19 Abb. Pr. 161). The irregularity is also cured, if the plaintiff becomes of age before the trial. (*Rutter v. Puckhofer*, 9 Bosw. 638; *Smart v. Haring*, 14 Hun, 276; *Sims v. N. Y. College Dentistry*, 35 Hun, 344; *affd.* without opinion, 108 N. Y. 661). If no guardian is appointed for an infant defendant, the judgment is voidable but not void. (*McMurray v. McMurray*, 66 N. Y. 175; *Crouter v. Crouter*, 133 N. Y. 55, 65). It may be set aside on motion or by action. (*Id.*; *Boyle v. McAvoy*, 29 How. Pr. 278;

Fairweather v. Satterly, 7 Robt. 546). No act of the defendant before he becomes of age, will waive or cure the irregularity. (*Fairweather v. Satterly*, *supra*; *McMurray v. McMurray*, 60 Barb. 117). The guardian *ad litem* who has been appointed for an infant defendant, must answer the complaint (*Farmer's Loan & Trust Co. v. Reid*, 3 Edw. Chan. 414), and do whatever is necessary to protect the rights of his wards. (*Knickerbacker v. DeFreest*, 2 Paige, 304). If the interests of the infant are likely to suffer by the neglect of his guardian, or of his attorney, the court will remove him. (*Litchfield v. Burwell*, 5 How. Pr. 341; *Lefevre v. Laraway*, 22 Barb. 167). A copy of the order appointing him should be served with the answer. The regularity of the service, or of the order, cannot be questioned after answering and judgment in an action. (*Barnard v. Heydrick*, 49 Barb. 62). A person appointed guardian, as prescribed in this article, for an infant defendant in an action, is not liable for the costs of the action, unless specially charged therewith by the order of the court, for personal misconduct. (Co. Civ. Proc. § 477). The guardian *ad litem* is entitled to such compensation for his service as the court may deem reasonable. But no order allowing compensation to guardians *ad litem*, shall be made except upon an affidavit to be made by such guardian, if an attorney of the court, or if the guardian be not an attorney, then an affidavit to be made by an attorney of the court who has acted in the matter in behalf of such guardian, showing that he has examined into the circumstances of the case, and has to the best of his ability made himself acquainted with the rights of his ward, and that such guardian has taken all the steps necessary for the protection of such rights to the best of his knowledge, and as he believes, stating what has been done by him for the purpose of ascertaining the rights of the ward. (General Rule 50).

CHAPTER V.

THE SUMMONS AND ITS SERVICE.

ARTICLE I....The summons.

ARTICLE II....Personal service of the summons.

ARTICLE III...Service other than personal.

ARTICLE IV...General appearance.

ARTICLE I.

THE SUMMONS.

SECTION.

1. When jurisdiction is acquired.
2. Contents of the summons.
3. Service of complaint or notice with the summons.
 - Subd. 1.—Actions on contract.
 - Subd. 2.—Actions for a penalty or forfeiture.
 - Subd. 3.—Notice of no personal claim.

Sec. 1. When Jurisdiction is Acquired.

A civil action is commenced by the service of a summons. But from the time of the granting of a provisional remedy the court acquires jurisdiction, and has control of all the subsequent proceedings. Nevertheless, jurisdiction thus acquired is conditional and liable to be divested, in a case where the jurisdiction of the court is made dependent, by special provision of law, upon some act, to be done after the granting of the provisional remedy. (Co. Civ. Proc. § 416). The issuing of the summons is not the commencement of an action. (*Kerr v. Mount*, 28 N. Y. 659; *Treadwell v. Lawlor*, 15 How. Pr. 8; *Warner v. Warner*, 6 Misc. 249). Provisional remedies, referred to in section 416, are those which may be granted before service of the summons, and the granting of which requires some action of a judicial officer. (*Adams v. Henry*, 3 Wk. Dig. 22). They are the granting of an order of arrest; of an injunction,

or of a warrant of attachment. (*McCarthy v. McCarthy*, 13 Hun, 579). Where a chattel is replevied before the service of the summons, as prescribed in this article, the seizure thereof by the sheriff is regarded as equivalent to the granting of a provisional remedy, for the purpose of giving jurisdiction to the court, and enabling it to control the subsequent proceedings in the action; and as equivalent to the commencement of the action, for the purpose of determining, whether the plaintiff is entitled to maintain the action, or the defendant is liable thereto. (Co. Civ. Proc. § 1693). Filing the summons, complaint, and notice of pendency, is not a provisional remedy in this section (*Haynes v. Onderdonk*, 5 T. & C. 176; 2 Hun, 619; *Burton Co. v. Cowan*, 80 Hun, 392; *affd.* without opinion, 150 N. Y. 583); neither is an order for the examination of a party (*Brandon Manfg. Co. v. Pettingill*, 2 Abb. N. C. 162), nor the approval in an undertaking in an action of replevin. (*Nosser v. Corwin*, 36 How. Pr. 540). Under the provisions of the code of procedure it was held that the court had jurisdiction to revive an action against the personal representatives of a deceased defendant, after the issuing of a warrant of attachment, although the summons had not been served (*More v. Thayer*, 10 Barb. 258); but, under the code of civil procedure, the action cannot be revived unless the service of the summons is completed prior to the party's death. (*Barron v. So. Brooklyn Saw Mill Co.*, 18 Abb. N. C. 352; *Ludwig v. Blum*, 43 N. Y. St. Rep. 617; 18 N. Y. Supp. 69). An action can only be commenced against a party by the service of the summons, or by his voluntary appearance. (*Akin v. Alb. Northern R. R. Co.*, 14 How. Pr. 337). An error in the given name of a defendant set forth in the summons does not prevent the acquisition of jurisdiction over such defendant, if he was fully apprised, when service was made upon him, that he was the party intended to be named therein and affected thereby. (*Stuyvesant v. Weil*, 167 N. Y. 421).

Sec. 2. Contents of the Summons.

The summons must contain the title of the action, specifying the court in which the action is brought, the

names of the parties to the action, and, if it is brought in the supreme court, the name of the county in which the plaintiff desires the trial; and it must be subscribed by the plaintiff's attorney, who must add to his signature his office address, specifying a place within the state where there is a postoffice. If in a city, he must add the street, and street number, if any, or other suitable designation of the particular locality. (Co. Civ. Proc. § 417). A summons which does not specify the court is not void. (*Tallman v. Hinman*, 10 How. Pr. 89). It was held under section 128 of the code of procedure that, if a copy of the complaint containing the name of the court was served with the summons, the defendant could not take advantage of the fact that the name of the court did not appear in the summons. (*Yates v. Blodgett*, 8 How. Pr. 278). But the code of procedure did not require the name of the court to be in the summons. Section 417 of the code of civil procedure differs from its predecessor—section 128 of the code of procedure—in requiring this. (*Wadsworth v. Georger*, 18 Abb. N. C. 199 and note, pp. 201, 202). It is now mandatory (*Wallace v. Dimmick*, 24 Hun, 635; *Osborn v. McLoskey*, 55 How. Pr. 345), and *Yates v. Blodgett* is, probably, no longer of authority. *Walker v. Hubbard* (4 How. Pr. 154) represents, doubtless, the law as it now is. It was there held that such a defect is an irregularity, for which the summons would be set aside, but that the lack may be supplied by amendment. It has been held that the words "Sup. Court" sufficiently state the name of the court. (*Walker v. Hubbard*, *supra*). If the plaintiff is designated in the summons as executor, he cannot sue in his individual capacity in the complaint subsequently served, and the variance will be fatal. (*Blanchard v. Strait*, 8 How. Pr. 83). If a party is sued by a fictitious name, under section 451, it must appear in the summons that he so sues. (*Aaron v. Lee*, 11 Wk. Dig. 527). Where, in an action for the foreclosure of a mortgage, even that portion of the name of the wife of one of the defendants, known to the plaintiff, was omitted, and only a description inserted, it was held to be an irregularity but amendable. (*Weil v. Martin*, 24 Hun, 645). Where the wife

is sued, the word "Mrs." followed by the name of her husband is a sufficient designation. (*Weil v. Martin*, 1 Civ. Proc. Rep. 133). Designating the christian names of the parties by initials merely is an irregularity, only, and may be disregarded, if it appears that there is no question of the identity of the parties. (*Grant v. Bird-sall*, 48 Super. 427). If unknown owners are made defendants, and described in the summons, the addition of the words "if any", does not invalidate the process. (*Abbott v. Curran*, 98 N. Y. 665). An objection that no specific persons are named as parties in an action is waived by answering. (*Amsinck v. Northrup*, 12 Wk. Dig. 573). In an action in the supreme court, the words "city and county of New York" have been held to be a sufficient designation of the county where a trial is desired. (*Ward v. Sands*, 10 Abb. N. C. 60). At the time of this decision the boundaries of the city, and of the county, of New York were co-terminous. By the Greater New York charter (L. 1897, Chap. 378), the city of New York includes other counties and the former practice of designating the place of trial by the words "city and county of New York" has fallen into merited disuse. An omission to name the place of trial in the summons, is an irregularity merely, and may be amended (*Wallace v. Dimmick*, 24 Hun, 635); as is, also, a variance between the date of the original summons and the copy served. (*George v. Fitzpatrick*, 25 Civ. Proc. Rep. 383). A printed subscription of the name of the plaintiff's attorney is sufficient. (*Barnard v. Heydrick*, 49 Barb. 62; *Mayor etc. v. Eisler*, 2 Civ. Proc. Rep. 125). The summons is invalid, if it is signed by one who is not an attorney. (*Johnston v. Winter*, 7 Alb. Law Jour. 135; *Wier v. Slocum*, 3 How. Pr. 397). The failure to add the office and postoffice address of the attorney may be amended. (*Wiggins v. Richmond*, 58 How. Pr. 376). The summons, exclusive of the title of the action and the subscription, must be substantially in the following form, the blanks being properly filled: "To the above named defendant: You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney

within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint. Dated .” The summons is deemed the mandate of the court. (Co. Civ. Proc. § 418). The summons may be amended (Co. Civ. Proc. § 723; *Weil v. Martin*, 1 Civ. Proc. Rep. 133); but only by the court. (*Mapes v. Brown*, 14 Abb. N. C. 94). If, however, the summons is amended without an order of the court, the irregularity is waived by retaining the amended summons, or it may be amended *nunc pro tunc* on a motion to set aside. (*Mapes v. Brown, supra*). Where the court directs a new defendant to be brought in and the order is not made upon his own application, a supplemental summons must be issued, directed to him, and in the same form as an original summons; except that, in the body thereof, it must require the defendant to answer the original or the amended complaint, and the supplemental complaint, or either of them, as the case requires. (Co. Civ. Proc. § 453). When additional parties are thus brought in, leave to serve a supplemental complaint, showing a cause of action against the additional parties, should be obtained.

Sec. 3. Service of Complaint or Notice with the Summons.

Subdivision 1.—ACTIONS ON CONTRACT.

A copy of the complaint may be served with the summons. If a copy of the complaint is not served with the summons, the plaintiff cannot take judgment by default, without application to the court, unless either the defendant appears, or a notice is served with the summons, stating the sum of money for which judgment will be taken, and the case is one embraced in the next section. (Co. Civ. Proc. § 419). Judgment may be taken without application to the court, where the complaint sets forth one or more causes of action, each consisting of the breach of an express contract to pay, absolutely, or upon a contingency, a sum or sums of money, fixed by the terms of the contract, or capable of being ascertained

therefrom, by computation only ; or an express or implied contract to pay money received or disbursed, or the value of property delivered, or of services rendered by, to, or for the use of, the defendant or a third person ; and thereupon demands judgment for a sum of money only. This section includes a case, where the breach of the contract, set forth in the complaint, is only partial ; or where the complaint shows that the amount of the plaintiff's demand has been reduced by payment, counter-claim, or other credit. (Co. Civ. Proc. § 420). The enumeration in section 420, of the cases where judgment may be taken without application to the court, is intended to include all cases where the clerk can assess the damages, and is a substitute for the phrase "an action arising on a contract for the recovery of money only", in subdivision first, section 129 of the code of procedure. The section refers only to cases where the action is brought upon a contract, express or implied, which is defined as being "a drawing together of minds until they meet, and an agreement is made to do, or not to do, some particular thing. It may be express, or it may be implied or inferred from circumstances, and this implication is but the result of the ordinary and universal experience of mankind. If A. borrows money of B. the courts may imply a promise to repay the money, for the universal experience is that in such a case a promise is exacted and made. An implied promise or contract is but an express promise, proved by circumstantial evidence. It is quite distinct from that fiction by which a statute liability has been deemed sufficient to sustain an action of *assumpsit*, upon the ground that a party subjecting himself to the penalty or other liability imposed by statute has promised to pay it. That feature does not suppose a contract but simply a promise *ex parte*". (*McCoun v. N. Y. C. & H. R. R. Co.*, 50 N. Y. 176, 180). This enumeration includes actions for goods sold (*Diblee v. Mason*, 1 Co. Rep. 37) ; an action against sureties on a replevin bond (*Montegriffo v. Musti*, 1 Daly, 77) ; an action for board, brought on a *quantum valebat* (*Mason v. Hand*, 1 Lans. 66) ; an action on a *quantum meruit* (*Champlin v. Deitz*, 37 How.

Pr. 214); and an action for liquidated damages expressed in a contract to convey lands. (*Cemetery Bd. v. Teller*, 8 How. Pr. 504). A complaint which alleges that the defendant, as agent for the plaintiff, received funds for the use of the plaintiff and collected certain moneys for the plaintiff, all of which sums were received in a fiduciary capacity by the defendants, sets forth a cause of action upon which the plaintiff can enter judgment without application to the court. (*Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 288)..

Subdivision 2.—ACTIONS FOR A PENALTY AND FORFEITURE.

In an action to recover a penalty or forfeiture, given by a statute, if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute must be indorsed upon the copy of the summons so delivered, in the following form: "According to the provisions of," etc.; adding such a description of the statute, as will identify it with convenient certainty, and also specifying the section, if penalties and forfeitures are given in different sections thereof, for different acts or omissions. (Co. Civ. Proc. § 1897). Actions brought by the people for a penalty or a forfeiture are governed by the rule laid down in this section, as well as those brought by individuals. (*Peo. v. O'Neil*, 54 Hun, 610). It applies to an action on a municipal ordinance (*Mayor v. Eisler*, 2 Civ. Proc. Rep. 125; S. C. 10 Daly, 396); but it does not apply to an action for a trespass where treble damages are recoverable. (*Sprague v. Irwin*, 27 How. Pr. 51). A notice under this section is sufficient, if it gives the defendant such information as to the offense, as the complaint would have given, had it been served with the summons. (*Prussia v. Guenther*, 16 Abb. N. C. 230). The notice is not sufficient, if it is in the body of the summons. (*Schoonmaker v. Brooks*, 24 Hun, 553). Where the endorsement upon the summons contained a reference to the statute and the section imposing the penalty, but not to the amendment giving the plaintiff the right to sue, it was held to be sufficient. (*Prussia*

v. *Guenther*, *supra*). The following forms have been held to be sufficient: "according to the provisions of title 9, part 1, chap. 20, of the statute of excise, and the regulation of taverns and groceries" (*Perry v. Tynen*, 22 Barb. 137); "issued according to the proceedings of title 9, chap. 20, part first of the revised statutes" (*Andrews v. Harrington*, 19 Barb. 343); "this summons is issued to collect penalties for violations of sections 13 and 14 of the code, to suppress intemperance, and to regulate the sale of intoxicating liquors, passed April 18, 1857, and the acts amendatory thereof, N. B. Packard, justice of the peace" (*Ripley v. McCann*, 34 Hun, 112); "issued according to the provisions of the statute concerning the incorporation of turnpike and plank road companies, and the collection of penalties for demanding and recovering more than lawful toll in passing through toll-gates on such roads," (*Marselis v. Seaman*, 21 Barb. 319). The following endorsements have been held to be insufficient: "according to the act 'of the internal police of the state'" (*Avery v. Slack*, 17 Wend. 85); in an action for the statutory penalty for allowing cattle to run at large upon the highway, "answer S. in a civil action for penalty for letting cattle run at large on a highway, to his damage of two hundred dollars or under." (*Schoonmaker v. Brooks*, 24 Hun, 553). A reference to "section 19, chap. 16, title 1, part 1, of the several statutes relating to overseers of highways and highway labor," is bad because it does not refer to any specific statute. (*Hitchman v. Baxter*, 34 Hun, 271). If the notice is omitted the summons is irregular (*Bissell v. N. Y. C. & H. R. R. Co.*, 67 Barb. 385); but the irregularity is waived by the defendant appearing and answering without objection. (*Id.*; *Vernon v. Palmer*, 48 Super. 231). It was held in *Lasson v. Aronson*, (29 Abb. N. C. 114; 21 Supp. 452), that where the notice was not indorsed upon the summons, the court did not get jurisdiction of the person of the defendant, even though there was a general appearance in the action by him; but the correctness of that holding, may be seriously questioned. A motion to set aside the service of a summons on the ground that it fails to comply with

this section will not be granted, where the affidavit, upon which the motion is based, is made by the defendant's attorney upon information and belief as to what the cause of action is, without stating the sources of his information and the grounds of his belief. (*Delisser v. N. Y., N. H. & H. R. Co.*, 59 Super. 233; 14 N. Y. Supp. 382).

Subdivision 3.—NOTICE OF NO PERSONAL CLAIM.

Where a personal claim is not made against a defendant, a notice, subscribed by the plaintiff's attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific, real or personal property, and that a personal claim is not made against him, may be served with the summons. If the defendant so served, unreasonably defends the action, costs may be awarded against him. (Co. Civ. Proc. § 423).

ARTICLE II.

PERSONAL SERVICE OF THE SUMMONS.

SECTION.

1. By whom made.
2. How made upon a natural person.
 - Subds. 1-2.—Upon an infant or incompetent person.
 - Subd. 3.—On the sheriff.
 - Subd. 4.—On other persons.
3. Upon a domestic corporation.
4. Upon a foreign corporation.
5. Service of process to commence special proceedings.
6. Proof of personal service.
 - Subd. 1.—Sheriff's certificate of service.
 - Subd. 2.—Affidavits of service.
 - Subd. 3.—Admission of service.

Sec. 1. By Whom Made.

The summons may be served by any person, other than a party to the action, except where it is otherwise specially prescribed by law. The plaintiff's attorney may, by an indorsement on the summons, fix a time within which the service thereof must be made; in that case, the service cannot be made afterwards. Where a summons

is delivered for service to the sheriff of the county, wherein the defendant is found, the sheriff must serve it, and return it, with proof of service, to the plaintiff's attorney, with reasonable diligence. (Co. Civ. Proc. § 425). Although service is made by the plaintiff personally, it is good after judgment. (*Myers v. Overton*, 2 Abb. Pr. 344; *Hunter v. Lester*, 10 Abb. Pr. 260; *Losey v. Stanley*, 83 Hun, 420; reversed with no discussion of this point, 147 N. Y. 560).

Sec. 2. How Made Upon a Natural Person.

Personal service of the summons upon a defendant, being a natural person, must be made by delivering a copy thereof to him within the state in the manner prescribed in the following subdivisions. (Co. Civ. Proc. § 426). The copy of the summons must also be left with the defendant as well as delivered to him. (General Rule 18). Where the copy of the summons delivered to a defendant was defective in not containing the name of the plaintiff's attorney, the omission was held to be an irregularity only. (*Hull v. Canandaigua Electric Light Co.*, 55 App. Div. 419).

Subdivisions 1 and 2.—UPON AN INFANT OR INCOMPETENT PERSON.

If the defendant is an infant, under the age of fourteen years, to the infant in person, and also to his father, mother or guardian; or, if there is none within the state, to the person having the care and control of him, or with whom he resides, or in whose service he is employed.

If the defendant is a person judicially declared to be incompetent to manage his affairs, in consequence of lunacy, idiocy or habitual drunkenness, and for whom a committee has been appointed, to the committee, and also to the defendant in person. (Co. Civ. Proc. § 426, Subds. 1, 2).

If the defendant is an infant of the age of fourteen years, or upwards, or if the court has in its opinion, reasonable ground to believe, that the defendant, by reason of habitual drunkenness, or for any other cause,

is mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the court may, in its discretion, with or without an application therefor, and in the defendant's interest, make an order, requiring a copy of the summons to be also delivered, in behalf of the defendant, to a person designated in the order, and that service of the summons shall not be deemed complete, until it is so delivered. (Co. Civ. Proc. § 427). In a case specified in subdivision first or second, of section 426, of the code of civil procedure, where the court has, in its opinion, reasonable ground to believe, that the interest of the person, other than the defendant, to whom a copy of the summons has been delivered, is adverse to that of the defendant, or that, for any reason, he is not a fit person to protect the rights of the defendant, it may likewise make an order, as prescribed in section 427. In a case specified in subdivision second, the court may, as a part of the same order, or by a separate order, made, in like manner, and upon like ground, at any stage of the action, appoint a special guardian *ad litem* to conduct the defense for the incompetent defendant, to the exclusion of the committee, and with the same powers, and subject to the same liabilities, as a committee of the property. (Co. Civ. Proc. § 428). Service on the infant alone, or only upon the other person specified in subdivision first, is not sufficient to give jurisdiction. (*Ingersoll v. Mangam*, 84 N. Y. 622; *Bellamy v. Guhl*, 62 How. Pr. 460). As the committee is an officer of the court, leave must first be obtained from the court to serve the committee, and if none such is obtained the service will be set aside. (*Smith v. Keteltas*, 27 App. Div. 279; *Matter of Delahunty*, 28 Abb. N. C. 245). In making service of the summons upon an insane married woman, it is not sufficient to leave the summons with a relative at her house. (*Heller v. Heller*, 6 How. Pr. 194).

Subdivision 3.—ON THE SHERIFF.

If the action is against a sheriff, for a cause specified in section 158 of the code, by delivering it to the defendant in person, or to his under-sheriff in person, or

at the office of the sheriff, during the hours when it is required by law to be kept open, to a deputy sheriff or a clerk in the employment of the sheriff, or other person in charge of the office. (Co. Civ. Proc. § 426, Sub. 3). The delivering of the summons to a person in charge of the sheriff's office is a good service upon the sheriff, although he has not filed with the county clerk a notice of the place where his office is held. (*Dunford v. Weaver*, 84 N. Y. 445).

Subdivision 4.—ON OTHER PERSONS.

In making service of summons on all other natural persons, the summons must be delivered to the defendant in person. (Co. Civ. Proc. § 426, Subd. 4). It must be served on the defendant himself. It is not enough that it be given to another person, who gives it to the defendant (*Williams v. Van Valkenburgh*, 16 How. Pr. 144); nor is it sufficient that it is delivered to the defendant who returns it, on being told that he may keep it. (*Niles v. Vanderzee*, 14 How. Pr. 547). If the defendant refuses to receive the summons, the person making service should explain the nature of the paper, and his purpose to serve it, and lay it down where the defendant may take it. (*Davison v. Baker*, 24 How. Pr. 39). If the summons, after delivery, is taken back the service is not good. (*Beckman v. Cutler*, 2 Code Rep. 151). Where a defendant sought to evade service of a summons and the process-server effected an entrance into the defendant's club but was prevented from actually handing the summons to the defendant by a servant, the court of appeals held that a proper service was accomplished by throwing the summons so that it fell within a few feet of the defendant, telling him that the papers were served on him, and leaving them. (*Wright v. Bennett*, 30 Abb. N. C. 65, note). Service must be made within the state, and no jurisdiction is acquired by service in any other state, but the irregularity is waived by a general appearance. (*Dunn v. Dunn*, 4 Paige, 425). If one is induced to come within the jurisdiction by fraud or false pretenses, the service of a process upon him will be set aside. (*Metcalf v. Clark*, 41 Barb. 45; *Baker v. Wales*, 35 Super.

403; *Dunham v. Cressy*, 21 St. Rep. 266; *Allen v. Wharton*, 36 St. Rep. 558; 13 Supp. 38). In such case, however, the court will only set aside the service of summons and will not dismiss the complaint. (*Beacom v. Rogers*, 79 Hun, 220). But this rule will not apply where the party voluntarily comes within the state, and is not induced to do so by any fraud or trick of the other party. (*A. P. Tel. Co. v. B. & O. R. R. Co.*, 46 Super. 377). If the defendant comes into the state voluntarily and submits to service, on the understanding that the trial shall take place immediately, the service will be set aside for the breach of this agreement. (*Graves v. Graham*, 19 Misc. 618). Service upon a non-resident will be set aside, if made when the defendant was attending court in this state as a witness (*Person v. Grier*, 66 N. Y. 124), or party (*Matthews v. Tufts*, 87 N. Y. 568), although he comes voluntarily into the state without any subpœna (*Searer v. Robinson*, 3 Duer, 622; *Merrill v. George*, 23 How. Pr. 331), or comes within the state to attend a term of the court of the United States held here (*Grafton v. Weeks*, 7 Daly, 523), or to attend the examination of a witness in this state, in an action pending in the circuit court of the United States in another circuit (*Parker v. Marco*, 136 N. Y. 585); or to attend as a witness before arbitrators. (*Sanford v. Chase*, 3 Cow. 381); or to have his deposition taken *de bene esse*, in a pending action (*Marks v. La. Soc. Anonyme*, 46 St. Rep. 660; 19 Supp. 470; *affd.* on opinion below, 139 N. Y. 630); or to attend an examination before a notary (*Hollender v. Hall*, 13 Supp. 758; 18 Civ. Proc. 394; *affd.* 19 Civ. Proc. 292). But if one, not a party or a witness, comes into the state to attend the trial of an action solely for his own purposes, he has no privilege, and service on him is good. (*Michaels v. Hain*, 78 Hun, 500). One who comes into the state to attend as a witness before a legislative investigating committee, pursuant to a subpœna, is privileged from the service of summons while he is waiting examination. (*Thorp v. Adams*, 33 St. Rep. 797; 11 Supp. 479). A non-resident director of a foreign corporation who comes into this state for the sole purpose of testifying as a witness in a pending action, is entitled

to the same privilege, and service of summons upon him in an action against the corporation will be set aside. (*Sheehan v. Bradford, etc. R. R. Co.*, 3 Supp. 790; *Sizer v. H. & B. R. R. Co.*, 57 App. Div. 390). The privilege may be waived, however. (*Weston v. Cits. Nat. Bk.*, 64 App. Div. 145). The rule is extended to a non-resident creditor attending proceedings in bankruptcy. (*Matthews v. Tufts, supra*). The privilege continues while the person is coming to the place where the court is held, actually remaining there in attendance at the court, and during such reasonable time afterwards as is necessary for him to return home (*Matter of Healey*, 53 Vt. 694; 38 Am. Rep. 713); but it has been held that a party has lost his privilege by going off his direct route in returning home to attend his son's funeral (*Chaffee v. Jones*, 19 Pick. 260); or by a delay of two days after submission to learn the result of the suit (*Clark v. Grant*, 2 Wend. 257); or of two weeks to attend to other business (*Shults v. Andrews*, 54 How. Pr. 380); or by going some half mile out of his way home on his way to a lawyer's office to attend to other business (*Herron v. Stokes*, 6 Ir. Eq. 125); or by a lawyer's stopping at a coffee house at two or three o'clock in the afternoon on business, the court having adjourned at one o'clock (*Strong v. Dickenson*, 1 M. & W. 488); or by remaining in the state an unreasonably long time, after his engagement as a witness has expired. (*Marks v. La. Soc. Anonyme, supra*; *Finch v. Galligher*, 12 Supp. 487). On the contrary, it has been held that the privilege was not lost by merely stopping to announce to the counsel of the opposite party that no steps would be taken in the action (*Salhinger v. Adler*, 2 Robt. 704); by stopping over one train (*Weber v. Boyer*, 1 W. N. C. 154); going to several places in the direction opposite to his residence, and within two hours after leaving court (*Selby v. Hills*, 8 Bing. 166); going to the office for one or two hours to sort his papers, and then calling at a tailor shop (*Pitt v. Coombes*, 5 B. & Ad. 1078); and stopping to dine with the attorney and witnesses in the afternoon, the case having gone off early in the day. (*Lightfoot v. Cameron*, 2 W. Bl. 1113). The privilege is

waived by putting in a general appearance in the action (*Chadwick v. Chase*, 5 Wk. Dig. 589); or by failing to claim the privilege at the time of arrest and delaying twenty-two days before moving to set it aside. (*Farmer v. Robbins*, 47 How. Pr. 415; see upon this subject note to *Matter of Healey*, 38 Am. Rep. 717). A resident witness is not exempt from service of summons while in attendance upon the court. (*Frisbie v. Young*, 11 Hun, 474). A minister of another government, accredited to a foreign country, and recognized as such by the government of the United States, is exempt from service upon him of a summons in this state, while he is herein on his way to his station. (*Wilson v. Blanco*, 56 Super. 582). Where a summons was served by a husband, upon his wife, inclosed in a small package, just as the ship in which she had embarked was about to sail, and only came to her notice after she had got out to sea, the service was set aside. (*Bulkley v. Bulkley*, 6 Abb. Pr. 307). Service made by a private person illegally entering the house of defendant, will be set aside. (*Mason v. Libbey*, 1 Abb. N. C. 354). The summons cannot be served on Sunday (Penal Co. § 268); but on any other holiday than Sunday service may be made. (*Didsbury v. Van Tassel*, 56 Hun, 423; *Matter of Bornemann*, 6 App. Div. 524). In an action to foreclose a mortgage, it has been held that it was a sufficient service on the wife of the mortgagor, if the summons was delivered to her husband for her (*Watson v. Church*, 3 Hun, 80), unless relief was sought against her separate property. (*Footc v. Lathrop*, 53 Barb. 183; *Nagle v. Taggart*, 4 Abb. N. C. 144). But in the later case of *Taggart v. Wade* (49 Hun, 265), it was held that personal service against the wife was necessary in such actions, and that the rule that the husband could enter an appearance for her, without service being made upon her, had been abolished. Service of the summons upon one in prison is good, either before or after conviction. (*Davis v. Duffie*, 1 Abb. Ct. of App. 486; *Slade v. Joseph*, 5 Daly, 187). A resident of the state, of full age, may execute, under his hand, and acknowledge, in the manner required by law to entitle a deed to be recorded, a written designation of another

resident' of the state, as a person upon whom to serve a summons, or any process or other paper for the commencement of a civil special proceeding, in any court or before any officer, during the absence from the state of New York of the person making the designation; and may file the same, with the written consent of the person so designated, executed and acknowledged in the same manner, in the office of the clerk of the county, where the person making the designation resides. The designation must specify the occupation, or other proper addition, and the residence of the person making it, and also of the person designated; and it remains in force during the period specified therein, if any; or, if no period is specified for that purpose, for three years after the filing thereof. But it is revoked earlier, by the death or legal incompetency of either of the parties thereto; or by the filing of a revocation thereof, or of the consent, executed and acknowledged in like manner. The clerk must file and record such a designation, consent or revocation; and must note upon the record of the original designation, the filing and recording of a revocation. While the designation remains in force, as prescribed in this section, a summons, or any process or other paper for the commencement of a civil special proceeding, against the person making it, in any court, or before any officer, may be served upon the person so designated, in like manner and with like effect, as if it were served personally upon the person making the designation, notwithstanding the return of the latter to the state of New York. (Co. Civ. Proc. § 430). The designation made under this section is not good unless it is accompanied by the consent to act, of the party designated to receive service, and is filed in the office of the county clerk, and a judgment after service upon such person will be vacated if the designation is not thus complete. (*Lyster v. Pearson*, 7 Misc. 98). The remedy for a defective service of the summons, is a motion to set it aside. (*Nones v. Hope, Mut. Life Ins. Co.*, 8 Barb. 541). Appearance and answer, or demurrer, waives the objection. (*O. & L. C. R. R. Co. v. V. & C. R. R. Co.*, 63 N. Y. 176, 181).

Sec. 3. Service on a Domestic Corporation.

Personal service of the summons upon a defendant, being a domestic corporation, must be made by delivering a copy thereof, within the state as follows:

1. If the action is against the mayor, aldermen and commonalty of the city of New York, to the mayor, comptroller, or counsel to the corporation.

2. If the action is against any other city, to the mayor, treasurer, counsel, attorney, or clerk; or, if the city has neither of those officers, to the officer performing corresponding functions, under another name.

3. In any other case, to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director, or managing agent. (Co. Civ. Proc. § 431). The service upon a man who is assistant treasurer, of a corporation, is not good under this section. (*Winslow v. S. I. R. T. R. R. Co.*, 51 Hun, 298). The managing agent referred to in subdivision three of this section, must be a person engaged in the general management of a corporation as distinguished from one who is engaged in the management of a particular branch of its business (*Emerson v. A. & O. L. R. R. Co.*, 13 Hun, 150), but he need not be one who has the entire charge or control of the business of the corporation. It is good service if he has such character and rank in the company, as to render it reasonably certain that the corporation will be apprised of the service of the summons. (*Barrett v. The American T. & T. Co.*, 56 Hun, 430; *affd.* 138 N. Y. 491). It has been held that the agent of an insurance company, authorized to effect insurance, to receive premiums and to issue policies at a place other than where the principal office is located, is a managing agent. (*Bain v. Globe Ins. Co.*, 9 How. Pr. 448). And so of an agent of a life insurance company, having general charge of its business in district composed of two cities. (*Ives v. Metro. L. I. Co.*, 78 Hun, 32; *Mullins v. The same*, 78 Hun, 297; *affd.* without opinion, 143 N. Y. 681). A division superintendent of a railroad company, is a managing agent within this section, and service upon him is good. (*R. H. & L. R. R. Co. v. N. Y. L. E. & W. R. R. Co.*, 48 Hun, 190;

Brayton v. N. Y. L. E. & W. R. R. Co., 54 St. Rep. 763). Where the person served was a general superintendent of the work of operating the lines of a telegraph company, it was held that he was a managing agent, and service upon him was good. (*Barrett v. A. T. & T. Co.*, *supra*). A baggage master is not a managing agent within this section (*Flynn v. H. Riv. R. R. Co.*, 6 How. Pr. 308); nor a general ticket and passenger agent (*Doty v. Michigan Cen. R. R. Co.*, 8 Abb. Pr. 427); nor one employed by a steam railroad company, to superintend the running of horse cars on an uncompleted part of its road (*Emerson v. A. & O. L. R. R. Co.*, 13 Hun, 150); nor is the attorney of record of a corporation in an action pending against it in this state (*Taylor v. Granite State Pro. Asso.*, 136 N. Y. 343). Where a corporation moves to set aside the service of the summons, because the person on whom it was served was not a managing agent within this section, the burden of proof is upon the corporation, to show that the person who was served, was not within the code. (*Donadi v. N. Y. S. Mut. Ins. Co.*, 2 E. D. Smith, 519; *Persons v. Buffalo City Mills*, 29 App. Div. 45). The trustees of a religious corporation acting as such, are the proper officers to serve. (*Berrian v. The Methodist Soc.*, 4 Abb. Pr. 424). Where there was no president or treasurer of the board of trustees of a religious society, and the secretary was out of the state, service was ordered to be made upon a trustee. (*Tom v. Method. Ep. Ch.*, 19 Wend. 25). Service on an officer of a corporation is good, although not made while he is acting officially. (*Pope v. Terre Haute Car & Man. Co.*, 87 N. Y. 137). After judgment dissolving the corporation, and the appointment of a receiver, process against the corporation cannot be served on one of its officers. (*Hetzel v. Tannehill Sil. Min. Co.*, 4 Abb. N. C. 40). The proper remedy for irregular service of summons under this section, is by a motion to set it aside. (*Emerson v. Aub. etc. R. R. Co.*, 13 Hun, 150). In actions brought under section 1919 of the code civil procedure, service on the chairman of the society is good, if he is presiding officer. (*Hatheway v. Amer. Min. Stock Ex.*, 31 Hun, 575).

Sec. 4. On a Foreign Corporation.

Personal service of the summons, upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the state, as follows:

1. To the president, treasurer, or secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose by a writing, under the seal of the corporation, and the signature of its president, vice-president, or other acting head, accompanied with the written consent of the person designated; and filed in the office of the secretary of state. The designation must specify a place, within the state, as the office or residence of the person designated; and, if it is within a city, the street, and street number, if any, or other suitable designation of the particular locality. It remains in force, until the filing in the same office of a written revocation thereof, or of the consent, executed in like manner; but the person designated may, from time to time, change the place specified as his office or residence, to some other place within the state, by a writing, executed by him, and filed in like manner. The secretary of state may require the execution of any instrument, specified in this section, to be authenticated as he deems proper, and he may refuse to file it without such an authentication. An exemplified copy of a designation so filed, accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the state, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the state. (Co. Civ. Proc. § 432). After a company has filed with the proper officer, the name of the person upon whom a process may be served, sending the name of another agent to the secretary of state is not a revoca-

tion of the first designation. (*Turner v. Fire Ins. Co. of Phil.*, 17 Wk. Dig. 212). Service upon the president of a foreign corporation is good, although he is not within the state upon official business. (*Pope v. Terre Haute Car Co.*, 87 N. Y. 137). The court acquires jurisdiction by service under subdivision first or second of section 432, although the cause of action did not arise in this state, and though the corporation has no property in this state, and a general judgment may be entered. (*Pope v. Terre Haute Co.*, *supra*; *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114, 131; *Miller v. Jones*, 67 Hun, 281). One who receives all the money upon sales by a foreign corporation, in its office in this state, and handles all its funds, is its cashier, under section 432. (*McCulloh v. Paillard Watch Co.*, 38 St. Rep. 406; 14 Supp. 491). If a foreign railroad corporation has an office in this state, in which a substantial portion of its business is transacted by a person designated by it as a general agent, although in some one department such person is a managing agent, and service of summons upon him is good. (*Tuchband v. C. & A. R. R. Co.*, 115 N. Y. 437). So service within the state upon a manager of a foreign corporation who is a general manager of such corporation, but whose office is in New Jersey, is good. (*Young & Fletcher Co. v. Welsbach Light Co.*, 55 App. Div. 16). Service on one who was president of a foreign corporation, after he has resigned, does not give jurisdiction. (*Ervin v. Oregon Steam Nav. Co.*, 22 Hun, 598). The property intended under subdivision third of section 432, is property liable to attachment (*Bates v. New Orleans R. R. Co.*, 4 Abb. Pr. 72; 13 How. Pr. 516), and something substantial, out of which the creditor may have some chance of collecting all, or a portion of his debt. (*Barnes v. Mobile etc. R. R. Co.*, 12 Hun, 126). Where one entered into the service of a foreign corporation, to procure emigrants to purchase and settle on defendant's lands in another state, but with the agreement that he was to occupy an office in the city of New York, it was held that the cause of action arose within this state, within subdivision third of section 432. (*Hil-ler v. B. & M. R. R. Co.*, 70 N. Y. 223). Under this

subdivision, service on a general solicitor of a foreign corporation was held to be good (*Clews v. Rockford etc. R. R. Co.*, 49 How. Pr. 117) ; but service on the attorney of record of the corporation in a foreclosure suit pending against it in this state was set aside. (*Taylor v. Granite State Pro. Assoc.*, 136 N. Y. 343). Service on the superintendent, and general managing agent of a railroad company was held good. (*Bank of Commerce v. R. & W. R. R. Co.*, 10 How. Pr. 1). It is not necessary that an officer who is served under this subdivision, should have the general charge of the whole business of the corporation, but if he be of sufficient character and rank in the corporation, to make it reasonably certain that the corporation will be apprised of the service, it will be held a sufficient service. (*Palmer v. Penn. R. R. Co.*, 35 Hun, 369; *affd.* without opinion, 99 N. Y. 679; *Hiller v. B. & M. R. R. Co.*, 70 N. Y. 224). An "eastern representative" of a newspaper who has charge of soliciting and contracting for advertisements is a "managing agent." (*Palmer v. Chicago Evening Post Co.*, 85 Hun, 403; *Brewer v. Knapp*, 27 Civ. Proc. Rep. 41). Where a foreign corporation has been deprived of its rights and franchises, but not actually dissolved, service on one of its officers is sufficient to give jurisdiction, and a receiver appointed after such service, will take title to property in this state. (*Murray v. Vanderbilt*, 39 Barb. 140). Where two corporations are consolidated according to certain statutory provisions, the officers of the original corporations are continued, in legal contemplation, so far as the provisions of this section of the code are concerned. (*Buell v. B. & O. S. W. R. R. Co.*, 39 App. Div. 236). The burden is on the corporation, in moving to set aside a service, to show that the person served does not come within the provisions of this section of the code. (*Silver v. Western Assurance Co.*, 3 App. Div. 573). By the insurance law (section 30) it is provided that no foreign corporation shall transact any business in this state, until it has executed and filed in the office of the superintendent of insurance, a written appointment, designating him to be the attorney of such corporation in this state, upon whom process in any action or

proceeding against the corporation may be served, with the same effect as if it were a domestic corporation; and service upon him is to be deemed service upon the corporation. This provision, however, does not exclude service according to section 432; and although the superintendent of insurance has been designated duly, the corporation can be properly served as provided by section 432. (*Howard v. Prudential Ins. Co.*, 1 App. Div. 136; *Silver v. West. Ass. Co.*, 3 App. Div. 572). Pursuant to this provision of the insurance law, it has been held that the superintendent of insurance received such designation as a public officer and not as an individual, and that service upon a clerk in his office, selected by him to receive process, was valid and binding on the company, and that he was at liberty to admit service. (*South Pub. Co. v. Fire Asso. of Phila.*, 67 Hun, 41; *affd. on opinion below*, 137 N. Y. 610; *Quinn v. Royal Ins. Co.*, 81 Hun, 207; reversed on another point, 156 N. Y. 327). It has also been held that where a summons against a foreign insurance company was mailed to the superintendent, and he gave an admission of service, that was a valid and sufficient service upon the company. (*Farmer v. Nat. Life Assoc. of Hartford*, 67 Hun, 119; *affd. with no discussion of this point*, 138 N. Y. 265). Appearance by the attorney of a foreign corporation is sufficient to give jurisdiction (*DeBemer v. Drew*, 57 Barb. 438), and such appearance in behalf of the corporation waives any irregularity in the manner of making service. (*O. & L. C. R. R. Co. v. Vt. & C. R. R. Co.*, 63 N. Y. 176, 181). Service upon a proper officer of the corporation who has been induced to come into the state for the purpose of getting jurisdiction will be set aside. (*Olcan R. Co. v. Fairmount Co.*, 55 App. Div. 292; see chapter 5, art. 2, sec. 1, subd. 4, *ante*). Where an officer of a foreign corporation has come into the jurisdiction for the purpose of attending a litigation, he cannot be served as such officer while he is engaged in the business that brought him here and for a reasonable time thereafter (*Sizer v. H. & B. R. R. Co.*, 57 App. Div. 390); but such exemption may be waived. (*Weston v. Cits. Nat. Bk.*, 64 App. Div. 145).

Sec. 5. Service of Process to Commence Special Proceedings.

The provisions of article 1 of title 1 of chapter 5 of the code of civil procedure relating to the mode of service of a summons, apply likewise to the service of any process, or other paper, whereby a special proceeding is commenced in a court, or before an officer, except a proceeding to punish for contempt, and except where special provision for the service thereof is otherwise made by law. (Co. Civ. Proc. § 433).

Sec. 6. Proof of Personal Service.

Proof of service, as prescribed in this article, must be made by affidavit, except as follows:

1. If the service was made by the sheriff, it may be proved by his certificate thereof.

2. If the defendant served is an adult, who has not been judicially declared to be incompetent to manage his affairs, the service may be proved by a written admission, signed by him, and either acknowledged by him, and certified in like manner as a deed to be recorded in the county, or accompanied with the affidavit of a person, other than the plaintiff, showing that the signature is genuine. A certificate, admission, or affidavit of service of summons, must state the time and place of service. A written admission of the service of a summons, or of a paper accompanying the same, imports, unless otherwise expressly stated therein, or otherwise plainly to be inferred from its contents, that a copy of the paper was delivered to the person signing the admission. (Co. Civ. Proc. § 434).

Subdivision 1.—SHERIFF'S CERTIFICATE OF SERVICE.

The certificate or proof of service must show the title of the action in which the service was made. (*Litchfield v. Burwell*, 5 How. Pr. 341). If the service is made by the sheriff of another county, or of another state, his certificate is not sufficient proof, but the service must be proved by affidavit. (*Morrell v. Kimball*, 4 Abb. Pr. 352; *Farmers' Loan and Trust Co. v. Dickson*, 9 Abb. Pr. 61). A clerical error in the sheriff's certificate of service, is not material where it sufficiently appears that

the service was made upon the defendant. (*Miller v. Brenham*, 68 N. Y. 83). It has been held that, if the sheriff has verbally deputized a person to make service of a summons in a particular action, the sheriff's certificate of that service is conclusive in that action (*Col. Ins. Co. v. Force*, 8 How. Pr. 353); but the majority of the cases hold that the defendant may be allowed to dispute the service, on a motion to set it aside. (*Van Rensselaer v. Chadwick*, 7 How. Pr. 297; *Wheeler v. N. Y. & Har. R. R. Co.*, 24 Barb. 414; *Wallis v. Lott*, 15 How. Pr. 567). Where the deputy died after service, the sheriff was ordered to make a certificate of service, on proof by affidavit that the deputy had received the summons, and that he had stated that he had served it, and the time of service. (*Barber v. Goodell*, 56 How. Pr. 364). If the judgment first entered in the action has been vacated, the sheriff's certificate of service is not *functus officio*, but may be used as proof of service upon the second entry of judgment. (*Brien v. Casey*, 2 Abb. Pr. 416).

Subdivision 2.—AFFIDAVITS OF SERVICE.

Where personal service of the summons, and of the complaint, or notice, if any accompany the same, shall be made by any other person than the sheriff, it shall be necessary for such person to state in his affidavit of service, his age, or that he is more than twenty-one years of age; when, and at what particular place, and in what manner he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein; and also to state in his affidavit, that he left with defendant such copy, as well as delivered it to him. No such service shall be made by any person who is less than eighteen years of age. In actions for divorce, or to annul a marriage, or for separate maintenance, the affidavit, in addition to the above requirements, shall state what knowledge the affiant had of the person served being the defendant, and proper person to be served, and how he acquired such knowledge. The court may require the affiant to appear in court and be examined in respect thereto, and when

service has been made by the sheriff, the court must require the officer who made the service to appear and be examined in like manner, unless there shall be presented with the certificate of service the affidavit of such officer, that he knew the person served to be the same person named as defendant in the summons, and shall also state the source of his knowledge. (General Rule 18). An affidavit of service is not defective in omitting to state the age or residence of the affiant, where it states that he is the plaintiff's attorney and his office and postoffice address is endorsed on the summons, to which the affidavit was annexed. (*Booth v. Kingsland Ave. Bldg. Assoc.*, 18 App. Div. 407). The affidavit of the person who made the service is not essential to the proof; a third person who saw the service made may prove it by his affidavit, and that affidavit will be sufficient. (*Murphy v. Shea*, 143 N. Y. 78). Where the affidavit stated that the summons was served "on or about" a certain day, it was held not a sufficient proof of service. (*Hickey v. Yrclin*, 4 Law. Bul. 70). An affidavit of service made by an attorney, founded on information from his clerk, and not stating either that the clerk knew the defendant, or the place and manner of service, is not sufficient proof. (*Spaulding v. Lyon*, 2 Abb. N. C. 203). A certificate, or affidavit of service, is not conclusive; the defendant may disprove it, on motion to set aside the proceedings. (*Wheeler v. N. Y. & Har. R. R. Co.*, 24 Barb. 414; *Wallis v. Lott*, 15 How. Pr. 567).

Subdivision 3.—ADMISSION OF SERVICE.

The admission of service must be shown to be genuine. (*Litchfield v. Burwell*, 5 How. Pr. 341). Its genuineness cannot be proved by the affidavit of the plaintiff. (Co. Civ. Proc. § 434). The want of proof of the genuineness of the signature must be objected to promptly, and may be amended after judgment. (*Jones v. U. S. Slate Co.*, 16 How. Pr. 129). The admission should state that the service was personal (*Read v. French*, 28 N. Y. 285), and also the place of service (*Trolan v. Fagan*, 48 How. Pr. 240; *Brown v. Marrigold*, 50 How.

Pr. 248), or the clerk has no authority to enter judgment upon it (*Read v. French, supra*); but the defect is not jurisdictional, and the judgment is only irregular, and not void. (*Maples v. Mackey*, 15 Hun, 533). An admission of due and personal service is sufficient. (*Id.*). If the admission is dated, the time of service need not be otherwise expressed; the date will be assumed to be the time of service. (*Id.*). The date in the admission is not conclusive. (*Rogers v. Schmersahl*, 2 T. & C. 668). If the admission is ante-dated so that the judgment is entered less than twenty days after actual service, that fact does not of itself render the judgment fraudulent as to creditors. (*Peck v. Richardson*, 9 Hun, 567). Any defect in the proof of service may be cured by amendment, at the hearing of a motion to vacate the judgment. (*White v. Bogart*, 73 N. Y. 257, 259; *Maples v. Mackey*, 89 N. Y. 146). A recital that the summons was personally served, contained in the judgment is sufficient to show jurisdiction of a court of general jurisdiction. *Maples v. Mackey, supra*; *Potter v. Merchants' Bank*, 28 N. Y. 651, 653).

ARTICLE III.

SERVICE OTHER THAN PERSONAL.

SECTION.

1. Substituted service.
2. Service by publication.
 - Subd. 1.—When it may be made.
 - Subd. 2.—What must be shown to obtain the order.
 - Subd. 3.—Order, by whom made and what to contain.
 - Subd. 4.—Filing papers—Notice.
 - Subd. 5.—Publication and service.
 - Subd. 6.—Proof of service.
 - Subd. 7.—When defendant allowed to defend.

Sec. 1. Substituted Service.

Where a summons is issued in any court of record, an order for the service thereof, upon a defendant residing within the state, may be made by the court, or a judge thereof, or the county judge of the county where the action is triable, upon satisfactory proof, by the affidavit of a person, not a party to the action, or by

the return of the sheriff of the county where the defendant resides, that proper and diligent effort has been made to serve the summons upon the defendant, and that the place of his sojourn cannot be ascertained, or, if he is within the state, that he avoids service, so that personal service cannot be made. (Co..Civ. Proc. § 435). The service provided for in this section was intended only for a case where a resident could not be found, or where, being found, he evaded service, and not where his abiding place out of the state was known. (*Collins v. Campfield*, 9 How. Pr. 519; *Foot v. Harris*, 2 Abb. Pr. 454). The law authorizing constructive service, is constitutional, and such service is a sufficient notice to constitute due process of law. (*Cont. Nat. Bk. v. Thurber*, 74 Hun, 632; *affd. on opinion below sub nom., Cont. Nat. Bk. v. U. S. Book Co.*, 143 N. Y. 648). Substituted service may be made upon infants who evade service. (*Steinhardt v. Baker*, 163 N. Y. 410). In a case where the defendant was confined to his house with illness, and his wife refused to permit the officers to have access to him, it was held that service might be made upon him, in the manner provided for in this section. (*Carter v. Youngs*, 42 Super. 169). An affidavit is sufficient, under this section, which shows that the sheriff had made diligent and proper efforts to serve the summons on the defendant, by going to his place of business and place of residence, but that he could not be found in the state. (*Simpson v. Burch*, 4 Hun, 315). So where the officer called frequently at the residence of the defendant, and asked to see her, but was denied, although the defendant had been on the street the day before, it was held sufficient to permit substituted service to be made under this section. (*McCarthy v. McCarthy*, 55 How. Pr. 418; 16 Hun, 546; *affd. without opinion*, 84 N. Y. 671; see, also, *Phillips v. Winne*, 47 St. Rep. 412). An affidavit was held sufficient to procure substituted service, where it appeared that the officer had used proper and diligent means, and had called repeatedly at the places where the defendant frequented, and at his house, and been told he was not at home, and that the person in charge did not know when he would

be at home, and he could not be found within or without the state. (*Nagle v. Taggart*, 4 Abb. N. C. 144). If the judge decides that the facts are satisfactorily shown to confer jurisdiction to make the order for substituted service, it is *res judicata*, and conclusive on a motion to vacate judgment. (*Collins v. Ryan*, 32 Barb. 647), or to vacate an attachment based upon it. (*Baker v. Stephens*, 10 Abb. Pr. N. S. 1, 30). And where judgment has been entered, after an order for substituted service of the summons, and an action has been brought upon that judgment, to set aside a fraudulent conveyance by the debtor, if the judgment is attacked for want of jurisdiction in that action, it is only requisite for the plaintiff to show that the defendant resides in this state. It is sufficient if the other facts specified in section 435, appear to the satisfaction of the judge granting the order for substituted service. (*Haswell v. Lincks*, 87 N. Y. 637). The order may be attacked by a motion to vacate it, or by appeal. (*Baker v. Stephens*, 10 Abb. Pr. N. S. 30). Service made in pursuance of an order granted under this section is equivalent to a service by publication. (*Clare v. Lockard*, 122 N. Y. 263; *Ferris v. Plummer*, 46 Hun, 515). The order must direct that the service of the summons be made, by leaving a copy thereof, and of the order, at the residence of the defendant, with a person of proper age, if upon reasonable application, admittance can be obtained, and such a person found who will receive it; or, if admittance cannot be so obtained, nor such a person found, by affixing the same to the outer or other door of the defendant's residence, and by depositing another copy thereof, properly inclosed in a postpaid wrapper, addressed to him, at his place of residence, in the postoffice at the place where he resides; or upon proof being made by affidavits that no such residence can be found, service of the summons may be made in such manner as the court may direct. (Co. Civ. Proc. § 436). In 1896 the last clause of this section was added. It sets aside the decision, rendered in 1893, in *Fiske v. Bennett* (69 Hun, 272) which held that, if the order permitted service to be made on a defendant,

at a place other than his residence, it was not valid. These sections apply to the city court of the city of New York. (*Molloy v. Lennon*, 22 Misc. 542). The order and the papers upon which it was granted, must be filed, and the service must be made, within ten days after the order is granted; otherwise the order becomes inoperative. On filing an affidavit, showing service according to the order, the summons is deemed served, and the same proceedings may be taken thereupon, as if it had been served by publication, pursuant to an order for that purpose, made as prescribed in section 438. (Co. Civ. Proc. § 437). The defendant who has been served by the order made under section 435, has twenty days from the time that substituted service was actually made, within which to answer. (*Orr v. McEwen*, 16 Hun, 625). An error in the given name of the plaintiff in the copy of the summons annexed to an order for substituted service may be corrected on motion; for such a mistake, the service need not, necessarily, be set aside. (*Farrington v. Muchmore*, 52 App. Div. 247).

Sec. 2. Service by Publication.

Subdivision 1.—WHEN IT MAY BE MADE.

An order, directing the service of a summons upon a defendant, without the state, or by publication, may be made in either of the following cases:

1. Where the defendant to be served is a foreign corporation, or being a natural person, is not a resident of the state; or where, after diligent inquiry, the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state.

2. Where the defendant, being a resident of the state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons; or keeps himself concealed therein, with like intent.

3. Where the defendant, being an adult, and a resident of the state, has been continuously without the state of New York more than six months next before the granting of the order, and has not made a designation of a

person upon whom to serve a summons in his behalf, as prescribed in section 430 of this act; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the state, after diligent effort.

4. Where the complaint demands judgment annulling a marriage, or for a divorce, or a separation.

5. Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in, or lien upon, specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property.

6. Where the defendant is a resident of the state, or a domestic corporation; and an attempt was made to commence the action against the defendant, as required in chapter fourth of this act, before the expiration of the limitation applicable there to, as fixed in that chapter; and the limitation would have expired within sixty days next preceding the application, if the time had not been extended by the attempt to commence the action.

7. Where the action is against the stockholders of a corporation, or joint stock company, and is authorized by a law of the state, and the defendant is a stockholder thereof.

When a copy of the summons is required by subdivision first or subdivision second of section four hundred and twenty-six, or by section four hundred and twenty-nine of the code, to be delivered to a person, other than the defendant, an order, directing the service of a copy of the summons upon such person without the state, or by publication, may be made as prescribed in this section, as if such person was the defendant in the action, and upon a verified complaint, and the same proof with respect to such person, as is required in section 439, with respect to a defendant. And sections 440 to 444, both inclusive, apply to the proceedings in like manner as if such person was a defendant. (Co. Civ. Proc. § 438). If it appears that the defendants actually reside in another state, and are absent from this state, it is sufficient to warrant service by publication (*Allen v.*

Malcolm, 12 Abb. Pr. N. S. 335); but those facts must be stated positively. (*Warren v. Tiffany*, 17 How. Pr. 106): Where it appears that defendant openly avoids service by eluding the sheriff within the state, and does not keep himself concealed, the case is not within subdivision second, section 438. (*Van Rensselaer v. Dunbar*, 4 How. Pr. 151). To authorize service by publication under subdivision second, it must appear that the departure or concealment of the defendant is with intent to defraud creditors, or to avoid service of a summons; to establish that it is with intent to defraud creditors, it must appear that he has property; and to establish that it was with intent to avoid service of a summons, it must appear that he knew, or had reason to believe, that a summons was about to be issued. *Towsley v. McDonald*, 32 Barb. 604). Section 438 does not apply to actions pending in the city court in New York. (Co. Civ. Proc. § 3160).

Subdivision 2.—WHAT MUST BE SHOWN TO OBTAIN THE ORDER.

The statute providing the service by publication is strictly construed, and all the requirements of it must be complied with, before the court can obtain jurisdiction. (*Kendall v. Washburn*, 14 How. Pr. 380). The order must be founded upon a verified complaint, showing a sufficient cause of action against the defendant to be served, and proof by affidavit of the additional facts required by the last section; and also, where the application is made upon the ground that the defendant is a foreign corporation, or not a resident of the state, or in a case specified in subdivision fourth, fifth, or seventh of the last section, that the plaintiff has been or will be unable, with due diligence, to make personal service of the summons. (Co. Civ. Proc. § 439). The requirement that a verified complaint, showing a sufficient cause of action against the defendant, be served, does not mean simply a complaint which will withstand a demurrer based upon the ground that it did not state facts sufficient to constitute a cause of action, but it must state a cause of action of which the court can take

cognizance, and of which it has jurisdiction. (*Paget v. Stevens*, 143 N. Y. 172). If an order is made for the service of the summons by publication upon a non-resident, or a foreign corporation, under subdivision 1, and the action is brought to recover a sum of money only, judgment cannot be rendered unless a warrant of attachment has been levied. (Co. Civ. Proc. § 1217; *Miller v. Jones*, 67 Hun, 281, 287). The theory of this rule is, of course, that there must be a *res* within the court's jurisdiction. Where a suit was brought to set aside, on the ground of fraud, a judgment annulling a marriage, it was held that the summons could be served by publication upon the non-resident husband, who obtained the alleged fraudulent judgment; the judgment is the *res*. (*Everett v. Everett*, 22 App. Div. 473). The summons may, likewise, be served by publication upon a non-resident trustee where an accounting concerning the estate committed to his care, by a New York court, is sought; although the action is in form *in personam*, there is a *res*—the fund—within the court's jurisdiction. (*Devlin v. Roussel*, 36 App. Div. 87). In the case of *Ladd v. Terre Haute C. & M. Co.* (13 Wk. Dig. 209) it was held that a verified complaint spoken of in this section, must be actually presented to the judge at the time of the application for the order; but the subsequent cases of *McCully v. Heller* (66 How. Pr. 468), and *Stow v. Stacy* (14 Civ. Proc. Rep. 45), held that if the verified complaint actually existed and was on file, and these facts appeared by the affidavits presented, it was not necessary that the complaint itself should be presented to the judge. These cases, however, were the decisions of the special term, whereas the case of *Ladd v. Terre Haute C. & M. Co.* was decided by the general term. It is believed, nevertheless, that the special term decisions contain a true statement of the law. It is absolutely necessary that there should be a verified complaint, and if the complaint is not verified, or if it has been verified out of the state, and the authority of the officer who takes the verification is not certified, or is not properly certified as prescribed in section 844, the statute is not complied with, and the order of publication will be void.

(*Williamson v. Williamson*, 3 Civ. Proc. Rep. 69; *Phelps v. Phelps*, 6 Civ. Proc. Rep. 117; *affd.* 32 Hun, 642). The proof required by section 439 must be made by affidavit (*Waffle v. Goble*, 53 Barb. 517; *Easterbrook v. Easterbrook*, 64 Barb. 421); but the affidavit may be made by the plaintiff in the action. (*Waffle v. Goble, supra*). All the requisite facts except, perhaps, the fact of non-residence, must be shown from actual knowledge, or if they are sworn to on information and belief, the source of the information and what it is, must be stated, so that the court can say whether or not it tends to prove the facts stated. (*McKinney v. Collins*, 13 Wk. Dig. 131; *revd.* on another point, 88 N. Y. 216; *Howe Mach. Co. v. Pettibone*, 12 Hun, 657; 74 N. Y. 68; *Greenbaum v. Dwyer*, 4 Civ. Proc. Rep. 276; *Easterbrook v. Easterbrook*, 64 Barb. 421; *Van Wyck v. Hardy*, 39 How. Pr. 392). If the fact of non-residence is relied upon to authorize service by publication, the affidavit must expressly state that the defendant is a non-resident. (*Young v. Fowler*, 73 Hun, 179). Where the residence of the defendant is unknown, information from others is competent to show where it is. (*Van Wyck v. Hardy, supra*). A return of the sheriff that he had made efforts to serve the defendant, and was informed he had left the state, is a sufficient basis on which to make an affidavit on information and belief, that defendant was a non-resident, and was not within the state. (*Howe Mach. Co. v. Pettibone*, 74 N. Y. 68; *Schroeder v. Lear*, 17 Wk. Dig. 574). The facts which tend to show that the plaintiff has been or will be unable, with due diligence, to make personal service, must be stated. A statement in the affidavit that the defendant cannot, after due diligence, be found, is sufficient if the court can discern from the whole substance of the affidavit that such was the case. (*Kennedy v. N. Y. L. I. & Tr. Co.*, 101 N. Y. 487; *Carlton v. Carlton*, 85 N. Y. 315; *Belmont v. Cornen*, 82 N. Y. 256; *Seiler v. Wilson*, 43 Hun, 629; *Jerome v. Flagg*, 48 Hun, 351). Where it appears that the defendants are non-residents, and are *at the time* actually out of the state, that is sufficient proof that the defendant will not be able to make personal service upon them.

(*Lookwood v. Brantly*, 31 Hun, 155; *Chase v. Lawson*, 36 Hun, 221; *Kennedy v. N. Y. Life Ins. & Trust Co.*, 101 N. Y. 487). Where, however, the affidavit states "that defendant is a non-resident of this state, nor can be found therein," but gives no facts showing that any effort was made to find him, it is insufficient to give jurisdiction, and judgment entered upon an order based on that affidavit, is void. (*McCracken v. Flanagan*, 127 N. Y. 493). For an admirable discussion of the distinction between *McCracken v. Flanagan* and *Kennedy v. N. Y. L. I & Tr. Co.*, both *supra*, as well as of this whole subject, see *Orr v. Currie* (14 Misc. 74). Where it appears that the defendant is a non-resident, and a summons has been issued, and efforts made to find him within the state, and that he was not there, that is sufficient to empower the judge to pass upon the question of due diligence. (*Belmont v. Cornen*, 82 N. Y. 256; *Crouter v. Crouter*, 133 N. Y. 55). But an order granted without any proof that due diligence has been made to find the defendant within the state, is a nullity (*Fetes v. Volmer*, 28 St. Rep. 317; *Campbell v. Taylor*, 9 Wk. Dig. 14; *Argall v. Bachrach*, 18 Wk. Dig. 267); also an order which is based only on proof that the defendant is a non-resident. (*Hyatt v. Swivel*, 52 Super. 1). When the order is asked for on the ground that the defendants are keeping themselves concealed with intent to avoid service, the affidavit must set forth the evidence showing such intent. (*Foster v. Moore*, 68 Hun, 526). When the affidavit contains evidence calling for the exercise of the judgment of the officer, he must pass upon the sufficiency of the proof, and his decision cannot be impeached collaterally (*Belmont v. Cornen*, *supra*); nor should an order, made upon such proof, be set aside, if there is nothing in the motion papers to disprove the facts set out in the affidavit on which the order was granted. (*Handley v. Quick*, 47 How. Pr. 233). To give the court jurisdiction to make an order of publication, it is not necessary to say that the defendant has property within the state. (*Clarke v. Boreel*, 21 Hun, 594; *Wood v. St. Louis B. & I Co.*, 1 Civ. Proc. Rep. 220). When an order for publication is

sought in an action for divorce under subdivision fourth of section 438, it must appear that the plaintiff is an actual inhabitant of the state. (*Yenney v. Yenney*, 1 Civ. Pro. Rep. 146, note). See, also, as to sufficiency of affidavit to support an order of publication 25 Civ. Proc. 21, note.

Subdivision 3.—ORDER, BY WHOM MADE AND WHAT TO CONTAIN.

The order may be made by a judge of the court or the county judge of the county where the action is triable. It must direct that service of the summons, upon the defendant named or described in the order, be made by publication thereof in two newspapers, designated in the order as most likely to give notice to the defendant, for a specified time, which the judge deems reasonable, not less than once a week for six successive weeks; or, at the option of the plaintiff, by service of the summons, and of a copy of the complaint and order, without the state, upon the defendant personally, and, if he is an infant under the age of fourteen years, also upon the person with whom he is sojourning; or, if the defendant is a corporation, upon an officer thereof, specified in sections four hundred and thirty-one and four hundred and thirty-two of this act. It must also contain, either a direction that, on or before the day of the first publication, the plaintiff deposit in a specified postoffice, one or more sets of copies of the summons, complaint, and order, each contained in a securely closed postpaid wrapper, directed to the defendant, at a place specified in the order; or a statement that the judge, being satisfied, by the affidavits upon which the order was granted, that the plaintiff cannot, with reasonable diligence, ascertain a place or places, where the defendant would probably receive matter transmitted through the post-office, dispenses with the deposit of any papers therein. (Co. Civ. Proc. § 440). The order for publication must be made by a judge; if made by the court, it is a nullity (*Schumaker v. Crossman*, 12 Wk. Dig. 99; *Phinney v. Broschell*, 19 Hun, 116; *affd.* 80 N. Y. 544); but if

the order is made by the judge, the fact that it has a caption and a direction to enter does not invalidate it. (*Phinney v. Broschell*, *supra*; *Lowerre v. Owens*, 14 App. Div. 215). The order need not recite that the papers presented, afford satisfactory proof of the facts required to be shown; that may be assumed from the making of the order. (*Barnard v. Heydrick*, 49 Barb. 62). Neither need it state that the papers designated in it are those most likely to give notice to the defendants. (*Schroeder v. Lear*, 17 Wk. Dig. 574; *Green v. Squires*, 20 Hun, 15). Nor where the order refers to the affidavits, and dispenses with the deposit of the papers in the postoffice, is it necessary to state that it satisfactorily appears to the judge by the affidavits, that the plaintiff could not ascertain the residence of the defendant. (*Green v. Squires*, *supra*). It was held in *Ritten v. Griffith* (16 Hun, 454) that an order for publication was void, unless it was in the alternative, and required either publication in two newspapers, or personal service without the state. This case was followed at a special term of the supreme court for the first district, and in the special term of the superior court in the city of New York. (1 Civ. Proc. Rep. 144, 145; 5 Law Bull. 31). The case of *Ritten v. Griffith*, was definitely overruled on this point, however, by the court of appeals in the *Matter of Field* (131 N. Y. 184), in which the court say, that the natural and sensible construction of the section is, not, that the order must direct both modes of service in every event, but while that is always proper, the order may direct service by due publication or may direct the service by personal delivery without the state, in the manner prescribed; and an order directing either mode alone, followed by due service in that manner, will be equally good, with one which directs both, with an option to choose either. Consequently, an order which provides improperly for the mailing of the papers and is, therefore, not valid as an order of publication, may still be valid as an order directing service without the state, and such service be sufficient. (*Sabin v. Kendrick*, 2 App. Div. 96). The order will be void, unless it directs the mailing of copies of the summons and com-

plaint (*Towsley v. McDonald*, 32 Barb. 604; *Ritten v. Griffith*, 16 Hun, 454), and a copy of the order of publication (*McCool v. Boller*, 14 Hun, 73; *11th Ward Bk. v. Powers*, 43 App. Div. 178), unless it is dispensed with by the judge, pursuant to the last clause of section 440. (*Walker v. Reiff*, 13 Wk. Dig. 331). The order must specify the postoffice to which the papers are to be addressed. (Cases *supra*); and the postoffice in which they are to be deposited. (*11th Ward Bk. v. Powers*, *supra*). An order of publication is not irregular because at the time it was granted a prior order of publication was still in force. (*Littlejohn v. Leffingwell*, 34 App. Div. 185). The validity of the order of publication is to be decided by the papers on which it was granted, and if they are insufficient, the order cannot be sustained (*Wortman v. Wortman*, 17 Abb. Pr. 66); but where the motion to set aside the order, was made after judgment, and the judgment roll was referred to, and was one of the papers on which the motion was founded, it was held that the roll and the papers in it might be resorted to, to sustain the order. (*Howe Mach. Co. v. Pettibone*, 12 Hun, 657; *affd.* 74 N. Y. 68). A motion to vacate the order for irregularity must specify the irregularity relied upon. (*O'Neil v. Bender*, 30 Hun, 204, 207).

Subdivision 4.—FILING PAPERS.—NOTICE.

Where service is made by publication, the summons, complaint, and order, and the papers upon which the order was made, must be filed with the clerk, on or before the day of the first publication; and a notice, subscribed by the plaintiff's attorney, and directed only to the defendant or defendants to be thus served, substantially in the following form, the blanks being properly filled up, must be subjoined to, and published with the summons:—"To _____ :—The foregoing summons is served upon you, by publication, pursuant to an order of _____" (naming the judge and his official title), "dated the _____ day of _____, 19 _____, and filed with the complaint, in the office of the clerk of _____, at _____." (Co. Civ. Proc. § 442). Where service is made without the state, the papers specified in

the last section must be previously filed; and a notice must be served with the summons, in all respects like the notice required by the last section, except the words, "without the state of New York," must be substituted for the words, "by publication." (Co. Civ. Proc. § 443). In an action of partition, where the summons is served by publication upon unknown owners, or upon defendants without the state, pursuant to section 438 and the following sections, the notice subjoined to a copy of the summons as published or served therewith, must in addition to the matters required in sections 442 and 443, state briefly the object of the action, and contain a brief description of the property. (Co. Civ. Proc. § 1541). In matrimonial actions, where the summons is served by publication, or by the delivery of a copy to the defendant without the state, there must be written or printed upon the face of it, the following words, or words to the same effect to wit: "Action to annul a marriage," "Action for a divorce," or "Action for a separation," according to the purpose for which the action is brought, and the fact that such words appear upon the face of the summons, must be shown by the proof of service. (Co. Civ. Proc. § 1774). If the complaint and papers on which the order was made, are not filed with the clerk, on or before the day of the first publication, or if the notice published omits to state the place of filing, the judgment will be void, and the defect is not one which can be amended (*Whiton v. Morning Journal Asscn.*, 23 Misc. 229; *Kendall v. Washburn*, 14 How. Pr. 380; *Smyth v. Rowe*, 4 Law Bull. 60); but mailing the papers before filing the order, is not an irregularity, and does not invalidate the proceedings. (*Silleck v. Heydrick*, 2 Abb. Pr. N. S. 57). The notice specified in section 443 need not be served, where the service is made by publication and mailing, and not by personal service without the state. (*LaFarge v. Mitchell*, 4 Law. Bull. 36). If the summons is served by publication, but the notice which is mailed to the defendant is the one specified in section 443, and not the one specified in section 442, that defect is not an irregularity which will prevent the court from ac-

quiring jurisdiction. (*Loring v. Binney*, 38 Hun, 152; *affd.* without opinion, 101 N. Y. 623). Neither is it such a defect, if the notice is directed to all the defendants, and not alone to those who were to be served. (*Id.*). An omission of the words "without the state," from a notice under section 443, is not a fatal irregularity. (*McCully v. Heller*, 66 How. Pr. 468).

Subdivision 5.—PUBLICATION AND SERVICE.

The first publication in each newspaper designated in the order, or the service upon the defendant without the state, must be made within three months after the order is granted. For the purpose of reckoning the time within which the defendant must appear or answer, service by publication is complete upon the day of the last publication, pursuant to the order; and service made without the state is complete upon the expiration thereafter of a time equal to that prescribed for publication. (Co. Civ. Proc. § 441). The publication must be made for a specified period of time. The statute does not provide for a publication six times within six weeks, but for a time not less than once a week, for six successive weeks; and that has been construed to mean, that it intended a full six week's publication, and not six times in six different weeks. (*Market National Bank v. Pacific National Bank*, 89 N. Y. 397). The defendant's time to appear and answer does not begin to run until the expiration of six full weeks, or forty-two days, after the first publication. (*Waters v. Waters*, 7 Misc. 519). Six publications are sufficient, and the statute does not require seven. (*Young v. Fowler*, 73 Hun, 179). Personal service out of the state, is a mere substitute for service by publication, and has no greater effect (*Fiske v. Anderson*, 12 Abb. Pr. 8; 33 Barb. 71), and it is not complete until six weeks after the service has been made. (*Market National Bank v. Pacific National Bank*, *supra*). The defendant has twenty days after the publication is completed, to appear and answer, and a judgment by default cannot be entered until that time has elapsed. (*Id.* *Brooklyn Trust Co. v. Bulmer*, 49 N. Y. 84). If personal service is made outside of the state,

pursuant to section 443, the summons need not be published. (*Jenkins v. Fahey*, 73 N. Y. 355). If the plaintiff dies before the publication is complete, further proceedings are rendered ineffectual, and jurisdiction of the defendants is not obtained by continuing the publication, although the action is subsequently continued in the name of the executrix. (*Reilly v. Hart*, 130 N. Y. 625).

Subdivision 6.—PROOF OF SERVICE.

Proof of the publication of the summons and notice must be made by the affidavit of the printer or publisher, or his foreman or principal clerk. Proof of deposit in the postoffice, or of delivery, of a paper required to be deposited or delivered by the provisions of this article, must be made by the affidavit of the person who deposited or delivered it. (Co. Civ. Proc. § 444). The affidavit of a person that he deposited the papers duly directed to the defendant at Bellville, N. J., and paid the postage thereon, there being regular communication between the city of New York and Bellville, was held sufficient to show the deposit in the postoffice at New York city. (*Steinle v. Bell*, 12 Abb. Pr. N. S. 171). Where the order directed the papers to be mailed to the defendant at Berlin, Germany, and the affidavit showed that they were directed to him at the "Union Club, Berlin, Germany," and the affidavit of service further showed that that was the residence of the defendant, the service was held to be good. (*Von Rhade v. Von Rhade*, 2 T. & C. 491). If there is printed on the outside of the envelope, a direction to return to the plaintiff, unless called for in ten days, the service will nevertheless be good, unless it is made to appear that by reason of those words being there, the defendant failed to get the papers. (*Gaffney v. Bigelow*, 2 Abb. N. C. 311).

Subdivision 7.—WHEN DEFENDANT ALLOWED TO DEFEND.

Where the summons is served, pursuant to an order made as prescribed in this article, and the defendant so served does not appear, he or his representative, on

application and sufficient cause shown, at any time before final judgment, must be allowed to defend the action, and, except in an action for divorce, or wherein the contrary is expressly prescribed by law, the defendant, or his representative, must, in like manner, upon good cause shown, and upon just terms, be allowed to defend, after final judgment, at any time within one year after personal service or written notice thereof; or, if such a notice has not been served, within seven years after the filing of the judgment roll. If the defense is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled, as the court directs; but the title to property, sold to a purchaser in good faith, pursuant to a direction contained in the judgment, or by virtue of an execution issued upon the same, shall not be affected thereby. (Co. Civ. Proc. § 445). This section does not deprive the courts of power to open a default in a divorce case, where the summons is served by publication. (*Brown v. Brown*, 58 N. Y. 609). It was held under the code of procedure, that to entitle the defendant to come in and defend under this section, he must show that there has been some irregularity in the proceedings; if he had been misled, the court would let him defend on the merits. (*Roche v. Ward*, 7 How. Pr. 416; *Jacquerson v. VanErben*, 2 Abb. Pr. 315). But under the code of civil procedure that is not so, and, where sufficient cause is shown for the interposition of an answer, the court has no discretion, but must grant the motion. (*Marrin v. Brandy*, 56 Hun, 242). If the motion is made before judgment, the court may grant it without imposing any conditions, but when made after judgment, proper terms must be imposed, and ordinarily the payment of the costs of the plaintiffs, which have been taxed in the judgment will be sufficient. (*Marvin v. Brandy*, *supra*).

ARTICLE IV.

GENERAL APPEARANCE.

SECTION.

1. How and when made.
2. Effect of a general appearance.
3. When defendant may appear.
4. When defendant must answer.

Sec. 1. How and When Made.

The defendant's appearance must be made by serving upon the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, a notice of appearance, or a copy of a demurrer or of an answer. A notice or pleading, so served, must be subscribed by the defendant's attorney, who must add to his signature his office address, with the particulars prescribed in section 417 of the code, concerning the office address of the plaintiff's attorney. (Co. Civ. Proc. § 421). There are many decisions under the code of procedure, and even prior to that time, holding that various acts which an attorney might do in the early stages of a litigation, other than an express general appearance, amounted to such. Under the code of civil procedure, it would seem that there must be an *express* notice of appearance or a demurrer or an answer. It has been held that service of a notice of motion to set aside an attachment, which notice was subscribed by the attorney as the defendant's attorney without qualification, is not equivalent to a general appearance (*Wood v. Furtick*, 17 Misc. 561); so, also, notice of motion to make the complaint more definite and certain (*Valentine v. Myers*, 36 Hun, 201); that the obtaining of stipulations extending the defendant's time to answer, by an attorney who signs one of the stipulations as the defendant's attorney, does not operate as a general appearance. (*Paine Lumber Co. v. Galbraith*, 38 App. Div. 68; *Bell v. Good*, 22 Civ. Proc. Rep. 356; 46 N. Y. St. Rep. 572; *Benedict v. Arnoux*, 38 N. Y. Supp. 882). On the other hand, it has been held that the filing of a petition to remove a cause from the state court to the United States

circuit court, is equivalent to a voluntary general appearance. (*Farmer v. Nat. Life Asscn.*, 138 N. Y. 265). This case may be distinguished on the ground that it proceeds upon the estoppel of the defendant to deny that an action is pending, after having taken a proceeding which could be predicated only on the existence and pendency of the action.

Sec. 2. Effect of a General Appearance.

A voluntary general appearance of the defendant is equivalent to personal service of the summons upon him. (Co. Civ. Proc. § 424). A voluntary appearance, to be effectual, must be made with the knowledge that the suit is pending, and with the intention to appear. (*Merkee v. City of Rochester*, 13 Hun, 157). A voluntary appearance of a non-resident, confers jurisdiction over his person (*Olcott v. Maclean*, 73 N. Y. 223; *Reed v. Chilson*, 142 N. Y. 152), and an appearance of a corporation by an attorney has the same effect (*Attorney General v. Guard. Mut. Life Ins. Co.*, 77 N. Y. 272); but a voluntary appearance of a foreign corporation by attorney, does not necessarily give jurisdiction of the subject matter of the action, although it gives jurisdiction of the person of the corporation, and where after such an appearance, it is found that part of the plaintiffs in the action are non-residents, and a case of jurisdiction is not made out within section 1780 of the code of civil procedure, the complaint will be dismissed as to such plaintiffs. (*Ervin v. Oregon R'y. & Nav. Co.*, 62 How. Pr. 490; 28 Hun, 269). In a case where the summons was served only on the mother of a non-resident infant defendant, and not upon the infant herself, and the mother procured herself to be appointed guardian *ad litem*, and answered, it was held that such an appearance and answer, did not constitute a general appearance for the infant under section 424, so as to give the court jurisdiction. (*Ingersoll v. Mangam*, 84 N. Y. 622). So, also, a general appearance by a guardian, appointed before service by publication is complete, does not give jurisdiction. (*Crouter v. Crouter*, 133 N. Y. 55). A

general appearance is not sufficient to entitle the defendant to notice of subsequent proceedings in an action, unless it is made in the manner prescribed by section 421 (*Couch v. Mulhane*, 63 How. Pr. 79; *Douglas v. Haberstro*, 8 Abb. N. C. 230; *Valentine v. Myers' Sanitary Depot*, 36 Hun, 201). An appearance and answer by a foreign corporation, waives any objection to an irregularity, or insufficient service of the summons. (*O. & L. C. R. R. Co. v. V. & C. R. R. Co.*, 63 N. Y. 176). When a foreign corporation has appeared in an action, if it does not plead an objection to the jurisdiction, it cannot at the trial take the objection that the court has no jurisdiction of it. (*Brooks v. N. Y. & Greenwood Lake R. R. Co.*, 30 Hun, 47). A general appearance in the county court confers jurisdiction over the person of the defendant (*Dake v. Miller*, 15 Hun, 356; *Bunker v. Langs*, 76 Hun, 543); but not over the subject matter of the litigation. (*Weidman v. Sibley*, 16 App. Div. 616). An appearance in the action by an attorney, is good, although the attorney is not authorized to appear (*Brown v. Nichols*, 42 N. Y. 26; *Washbon v. Cope*, 144 N. Y. 287; *Mayor etc. v. Smith*, 20 N. Y. Supp. 666; appeal dismissed, 138 N. Y. 676); and the judgment entered after such an appearance, cannot be attacked collaterally (*Id.*); but it may be attacked on a motion to set aside. (*Burton v. Sherman*, 20 Wk. Dig. 419). Such motion must be made promptly. (*Abbett v. Blohm*, 54 App. Div. 422). If the defendant is a non-resident, an unauthorized appearance for him, by an attorney, will be set aside, on his motion. (*Nordlinger v. DeMicr*, 54 Hun, 276; *Vilas v. P. & M. R. R. Co.*, 123 N. Y. 440). But the defendant must move promptly; if he permits the attorney to proceed for him in the action, the appearance will not be set aside. (*Bilas v. Butler*, 29 St. Rep. 664; 9 Supp. 82). If however the alleged notice of appearance by an attorney is a forgery, that fact may be shown at any time, either for the purpose of impeaching the judgment collaterally, or to set aside the appearance. (*Ferguson v. Crawford*, 70 N. Y. 253). Where an attorney appears for the defendant by mistake, supposing the summons had been personally served on his

client, he will be allowed to withdraw his appearance. (*Hunt v. Brennan*, 1 Hun, 213; *Dillingham v. Varron*, 26 Supp. 1109). Every voluntary appearance in an action does not operate to waive irregularities, and to give the court jurisdiction of the person of the defendant. An appearance on a void appeal, for the mere purpose of a motion to set it aside, does not waive want of jurisdiction. Obtaining an extension of time, for the purpose of a proceeding in which the defendant refuses to appear generally in the action, was held not to be a general appearance, which was operative to waive any irregularity. (*Thomas v. Jones*, 3 Law Bull. 36). Where a defendant, sued in a local court of general jurisdiction, sets up in his answer (it not appearing by the complaint), that he is a resident of another state, and that the summons was served upon him in that state only, and protested against the jurisdiction of the court, and interposed no other defense upon the merits; this was held not to amount to personal service of a summons, or a submission to the jurisdiction of the court. (*Sullivan v. Frazee*, 4 Robt. 616). A general appearance by a defendant sued in a local court does not waive the right to object in his answer, that the court has not jurisdiction of the subject matter of the action, if the case is such that the only means by which the action can be brought in that court, is the service of a summons within the limits of its jurisdiction. (*Wheelock v. Lee*, 74 N. Y. 495; *Weidman v. Sibley*, 16 App. Div. 616). It was held in *Hamburger v. Baker* (35 Hun, 455) that where the summons was served without the state, the service of an answer verified by the defendant and subscribed by an attorney (as attorney for the defendant), was not a general appearance, so as to confer jurisdiction, where the answer set up the fact that the defendant was not, at the time of the commencement of the action, a resident of the state, and that he had no property, and had not been served with summons within the state, although he added that plea to other defenses upon the merits. But the case of *Reed v. Chilson* (40 St. Rep. 960; 16 Supp. 744), disapproved *Hamburger v. Baker*, and held that in such a case a general appearance conferred upon

the court jurisdiction of the defendant, and that such jurisdiction was not divested by the service of an answer denying the jurisdiction of the court. This case was affirmed by the court of appeals. (*Reed v. Chilson*, 142 N. Y. 152). It was stated in that case, that when a non-resident did not intend to submit himself to the jurisdiction of the court, he might either appear specially for the purpose of raising the question of jurisdiction by motion, or he might allow the plaintiff to take judgment by default, without affecting his rights. (*Reed v. Chilson*, *supra*). While, however, a special appearance for the mere purpose of making a motion, or taking some steps in the action which does not amount to a recognition of the jurisdiction of the court, does not affect the right of a defendant to move to vacate the service of process upon him, he waives that right when he becomes an actor in the suit and institutes a proceeding which has for its basis the existence of an action to which he is a party, and which he could not take, if such action did not exist. (*Farmer v. The Nat. Li. Asso.*, 138 N. Y. 265).

Sec. 3. When the Defendant may Appear.

Whenever a judgment is sought against the defendant he may appear, although he has not been served with summons. (*Rohman v. Blust*, Daily Reg. October 5th, 1884; *Higgins v. Freeman*, 2 Duer, 650). In an action against partners on a joint liability, one partner although not served, may appear and answer (*Wellington v. Claason*, 9 Abb. Pr. 175; 18 How. Pr. 10); despite the plaintiff's objection. (*McLaughlin v. Bieber*, 26 Misc. 143; *Jones v. Brooke*, 52 App. Div. 421). After the defendant's property has been replevied, he may appear in an action, although he has not been served with summons. (*Clinton v. King*, 3 How. Pr. 55). Where an injunction has been granted, which affects the rights of the defendant, he may appear and move to vacate it, although no process has been served upon him. (*Waffle v. Vanderheyden*, 8 Paige, 45). If he has been arrested in the action, he is entitled to appear and defend it, although he has not been served with summons (*Georgia*

Lumber Co. v. Bissell, 9 Paige, 225); but if the defendant has no right to protect in an action, and has not been served with summons, he cannot become a party by appearing. (*McKnight v. Baker*, 1 How. Pr. 201; *Tracy v. Reynolds*, 7 How. Pr. 327). A husband cannot enter an appearance for his wife, who has not been served with summons in the action. (*Taggart v. Rogers*, 49 Hun, 265). One who is served with a summons in which he is not named as a defendant, and to which he is not intended to be a party, is not entitled to appear, and if upon appearing, he is informed of the facts and request to withdraw, and refuses to do so, the action will be discontinued as to him on motion of the plaintiff with costs of the motion to be paid by that defendant. (*Abeel v. Conhyser*, 42 How. Pr. 252).

Sec. 4. When the Defendant Must Answer.

A defendant, upon whom the plaintiff has served, with the summons, a copy of the complaint, must serve a copy of his demurrer or answer upon the plaintiff's attorney, before the expiration of the time, within which the summons requires him to answer. If a copy of the complaint is not so served, a notice of appearance entitles him only to notice of the subsequent proceedings, unless within the same time he demands the service of a copy of the complaint, as prescribed in section four hundred and seventy-nine of the code. (Co. Civ. Proc. § 422). The defendant cannot answer if his time has expired, although the adverse party has not acted on his default. (*Mandeville v. Winne*, 5 How. Pr. 461; *McGown v. Leavenworth*, 2 E. D. Smith, 24). An infant defendant is entitled to twenty days after the appointment of a guardian *ad litem* to demand a copy of the complaint, and his time to answer does not begin to run until a guardian *ad litem* is appointed. (*Kastner v. Durant*, 1 Law. Bull. 11). Where an order for service of the summons by publication has been made, and the defendant serves a general notice of appearance, the time to serve a copy of the complaint expires twenty days after the date of the service of such appearance. (*11th Ward Bk.*

v. *Powers*, 43 App. Div. 178). A defendant who is arrested before answering, but more than twenty days after the service of summons and complaint upon him, has twenty days after he has been arrested to answer. (Co. Civ. Proc. § 566; *Clady v. Wood*, 66 How. Pr. 1).

CHAPTER VI.

NOTICE OF PENDENCY OF ACTION.

ARTICLE I....When to be filed by plaintiff.

ARTICLE II...Contents of the notice.

ARTICLE III...Recording.

ARTICLE IV...When filed by defendant.

ARTICLE V...Effect of the notice.

ARTICLE VI...Amendment and cancellation.

ARTICLE I.

WHEN TO BE FILED BY PLAINTIFF.

In an action brought to recover a judgment affecting the title to, or the possession, use, or enjoyment of, real property, the plaintiff may, when he files his complaint, or at any time afterwards before final judgment, file in the clerk's office of each county where the property is situated, a notice of the pendency of the action, stating the names of the parties, and the object of the action, and containing a brief description of the property in that county, affected thereby. Such a notice may be filed with the complaint, before the service of the summons; but, in that case, personal service of the summons must be made upon a defendant, within sixty days after the filing, or else, before the expiration of the same time, publication of the summons must be commenced, or service thereof must be made without the state, pursuant to an order obtained therefor, as prescribed in chapter fifth of the code. (Co. Civ. Proc. § 1670). In actions of foreclosure, the notice of pendency of the action must be filed, at least twenty days, before the application is made for judgment in the action. (Co. Civ. Proc. § 1631). Substituted service under section 435 of the code, within the required time after filing

of the notice of pendency, is equivalent to personal service to support the notice. (*Ferris v. Plummer*, 46 Hun, 515). A notice of pendency of action is not operative until the complaint has been filed. (*Weeks v. Tomes*, 1 Hun, 349; *affd.* 76 N. Y. 601). If the complaint has actually been filed with the notice, the fact that the filing was not minuted, or that it was removed from the office to be used in court, does not invalidate the notice. (*Waring v. Waring*, 7 Abb. Pr. 472). If the notice has been filed before the complaint, a subsequent filing of the complaint makes the notice operative from the time of such a filing. (*Benson v. Sayre*, 7 Abb. Pr. 472, note). The phrase "real property," as used in this section, includes all the estates in land, not only estates of inheritance, but estates for life, for years, at will, and by sufferance; and the notice may be filed in any action involving the title to, or the possession, use, or enjoyment of, any of these estates. (*Wilmont v. Meserole*, 41 Super. 274). The notice may be filed in an action by a vendor of real estate to recover, as unpaid purchase money, a part of the price which has been paid in railroad bonds, fraudulently transferred to the plaintiff, and to make the recovery a lien on the lands. (*Mills v. Bliss*, 55 N. Y. 139). In an action where the plaintiff claimed title to a share of real property devised, and the rents and profits received by the defendant as executor, and asked for an accounting and an adjudication as to the rights of the parties in the premises, it was held that a notice of pendency was properly filed. (*Kunz v. Bachman*, 61 How. Pr. 519; 12 Wk. Dig. 522). It has been held that the notice of pendency was properly filed in an action to avoid and cancel a lease of lands, and also in an action to enforce specific performance of a contract to sell leasehold interests in lands. (*Wilmont v. Meserole*, *supra*; *Ruck v. Lange*, 10 Hun, 303). Where the plaintiff sued to have a married woman's debt declared a lien on her separate real estate, the court held that a notice of pendency of the action was properly filed. (*Sanders v. Warren*, 2 W. D. 507; *Brainerd v. White*, 48 Super. 399). An action to enforce a vendee's lien

upon land for money paid upon a contract for its purchase, where the vendor is unable to give a good title, is an action affecting the title to or the possession, use or enjoyment of the land, and a notice of pendency may be filed in such an action. (*Bachmann v. Wagner*, 40 St. Rep. 757; 16 Supp. 67). But an action for damages for trespass on real property is not within section 1670, even though the title to the property be litigated in that action. (*Hailey v. Ano*, 136 N. Y. 569). This section of the code applies to actions of ejectment. It is necessary in those actions to file a notice of pendency of the action, if it is desired to bind by the judgment, parties taking transfer of possession of the lands *pendente lite*. This was not the case under the code of procedure (*Sheridan v. Andrews*, 49 N. Y. 478, 482); but the reason of that was that under the code of procedure the judgment in ejectment bound not only the parties to the action, but all persons claiming under the defendant by a title acquired after the commencement of the action. (p. 482). That rule is now changed by the code of civil procedure, by which the judgment of ejectment is binding upon each party against whom it is rendered, and every person claiming from, through, or under him, by a title accruing either after the judgment roll is filed, or after a notice of a pendency of action is filed as prescribed in section 1670. (Co. Civ. Proc. §§ 1524, 1526). For these reasons, it is believed that it is necessary to file the notice of pendency in every action of ejectment, to give full effect to the judgment therein. The right to file a notice of pendency is absolute in any case within the statute. (*Mills v. Bliss*, 55 N. Y. 139; *Beman v. Todd*, 124 N. Y. 114). In cases in which a warrant of attachment has been issued, and real property levied upon under the attachment, a notice must be filed, stating the names of the parties to the action, the amount of the plaintiff's claim as stated in the warrant, and a description of the particular property levied upon. The notice must be subscribed by the plaintiff's attorney, adding his office address; and must be recorded and indexed by the clerk, in the same book, in like manner, and with like effect,

as a notice of the pendency of an action. (Co. Civ. Proc. § 649, sub. 1).

ARTICLE II.

CONTENTS OF THE NOTICE.

The notice must state the names of the parties, the object of the action, and must contain a brief description of the property in the county affected by the action. (Co. Civ. Proc. § 1670). In foreclosure cases, in addition to the particulars required in section 1670, the notice must specify the date of the mortgage, the parties thereto, and the time and place of recording it. (Co. Civ. Proc. § 1631). The fact that the middle letter is wrongly inserted in the name of one of the defendants, is not material. (*Weber v. Fowler*, 11 How. Pr. 458). The description of the lands should specify only the land to be affected by the judgment. (*Fitzgerald v. Blake*, 42 Barb. 513). It should be sufficiently certain to enable the land to be located. "All the real property of the defendant Brown, or in which she has an interest, in Chenango county," is void for indefiniteness. (*Jaffray v. Brown*, 17 Hun, 575).

ARTICLE III.

RECORDING.

Each county clerk, with whom such a notice is filed, must immediately record it, in a book kept in his office for that purpose, and index it to the name of each defendant, specified in a direction, appended at the foot of the notice, and subscribed by the attorney for the plaintiff. (Co. Civ. Proc. § 1672).

ARTICLE IV.

WHEN FILED BY THE DEFENDANT.

Where a defendant sets up in his answer a counterclaim, upon which he demands an affirmative judgment affecting the title to, or the possession, use, or enjoy-

ment of, real property, he may, at the time of filing his answer, or at any time afterwards before final judgment, file a like notice. The provisions of sections 1670, 1671 and 1672 apply to such a notice. For the purpose of such an application, the defendant filing such a notice is regarded as a plaintiff, and the plaintiff is regarded as a defendant. (Co. Civ. Proc. § 1673).

ARTICLE V.

EFFECT OF NOTICE.

Where the notice of the pendency of an action may be filed, as prescribed in section 1670, the pendency of the action is constructive notice, from the time of so filing the notice only, to a purchaser or incumbrancer of the property affected thereby, from or against a defendant, with respect to whom the notice is directed to be indexed, as prescribed in section 1672. A person, whose conveyance or incumbrance is subsequently executed, or subsequently recorded, is bound by all proceedings taken in the action, after the filing of the notice, to the same extent as if he was a party to the action. (Co. Civ. Proc. § 1671). In actions of ejectment, a final judgment is binding upon each party against whom it is rendered, and every person claiming from, through or under the defendant, by title accruing after a notice of pendency of the action is filed in the clerk's office. (Co. Civ. Proc. §§ 1524, 1526). In actions for dower, for the foreclosure of a mortgage, for the determination of claims to real estate, and of partition, judgment is conclusive upon each person claiming under a party thereto and whose title to the real estate involved accrues after the filing of the notice of pendency pursuant to section 1670. (Co. Civ. Proc. §§ 1619, 1632, 1557, sub. 2, 1646). The filing of the notice of pendency of the action is not the commencement of a suit for any other purpose than for constructive notice to the parties. (*Haynes v. Onderdonk*, 2 Hun, 619). A subsequent judgment creditor of the defendant after filing of the notice, is bound by the judgment, although he is not a party to the action. (*Fuller v. Scribner*, 76 N. Y. 190;

Hull v. Spratt, 1 Hun, 298). A grantee of a mortgagor whose deed is not recorded until after the notice is filed, is bound by the judgment, although he is not a party to the action. (*Kindberg v. Freeman*, 39 Hun, 466; *affd.* without opinion, 109 N. Y. 653; *Kursheedt v. U. D. S. Ins't.*, 118 N. Y. 358). The notice only relates to and effects incumbrances, liens or alienations by the defendant or subordinate to his right, and it does not affect a title independent and adverse to his, nor one prior to that on which the action is based. A tax title from the comptroller upon a tax against the mortgagor, is not affected by the judgment of foreclosure. (*Becker v. Howard*, 4 Hun, 359; 66 N. Y. 5). The notice has only the same effect upon the holder of an unrecorded prior incumbrance or conveyance, that making him a party would have. If the plaintiff has notice of the prior deed or incumbrance, the judgment does not affect the rights of the prior holder. (*Lamont v. Cheshire*, 65 N. Y. 30). In an action of ejectment, the filing of a notice of pendency of action does not affect the rights of a lessee in possession from one who is not a defendant in that action. (*Thompson v. Clark*, 4 Hun, 164). No one can take advantage of the failure to file the notice of pendency in an action of foreclosure, except when he is affected by it. (*White v. Coulter*, 1 Hun, 357). The notice of pendency is effective and operative from the time of filing although the county clerk fails to index it as directed. (*Hartwell v. Riley*, 47 App. Div. 154).

ARTICLE VI.

AMENDMENTS AND CANCELLATION.

Sec. 1. Amendment.

A notice of pendency of action may be amended by the court by inserting a specific description of land omitted, or the names of parties, or correcting any mistake. (*Vanderheyden v. Gary*, 38 How. Pr. 367). If after filing a notice of pendency of action, the names of parties are stricken out, it is safer to file a new notice. (*Curtis v. Hitchcock*, 10 Paige, 399). If new parties are brought in, an amended notice of pendency of action

must be filed to bar all claims under the new parties, or to enable the plaintiff to take judgment in an action of foreclosure. (*Clark v. Havens*, Clarke Chan. 560; *Curtis v. Hitchcock*, *supra*). If the names of parties are added, and subsequently struck out, a new notice does not seem to be required. (*Waring v. Waring*, 7 Abb Pr. 472).

Sec. 2. Cancellation.

After the action is settled, discontinued, or abated, or final judgment is rendered therein against the party filing the notice, and the time to appeal therefrom has expired, or if a plaintiff filing the notice unreasonably neglects to proceed in the action, the court may, in its discretion, upon the application of any person aggrieved, and upon such notice as may be directed or approved by it, direct that a notice of the pendency of an action, filed as prescribed in the last four sections, be canceled of record by a particular clerk, or by all the clerks, with whom it is filed and recorded. The cancellation must be made by a note to that effect, on the margin of the record, referring to the order. Unless the order is entered in the same clerk's office, a certified copy thereof must be filed therein, before the notice is canceled. (Co. Civ. Proc. § 1674). In 1892, an amendment to this section provided that in a judgment creditor's action, the court may, at any stage of the proceedings, and upon notice direct the *lis pendens* to be canceled, upon payment into court of the amount of the judgment sought to be enforced with certain additions enumerated, or upon the giving of an undertaking with two sureties in a sum double the amount of the judgment. The practice on an application to cancel a *lis pendens* under this provision is amply set forth in the ramifications of this amendment. The right to file a notice of pendency of action in a proper case, is absolute, and does not rest in the discretion of the court, and when a notice has been properly filed it cannot be canceled, except for the reasons and in the manner prescribed in this section or some other statutory provision. (*Beman v. Todd*, 124 N. Y. 114; *Breen v. Lennon*, 10 App. Div. 36). Where the plaintiff has availed himself of the leave of the court,

to enter a judgment dismissing the complaint without costs, and then appealed from the judgment which has been affirmed, it would be a sufficient ground to cancel the *lis pendens*, if it is made to appear by the defendant, that its continuance was prejudicial to his interests and an obstacle to the successful use of his property. (*Lennon v. Stiles*, 31 St. Rep. 115; 9 Supp. 358). So where, after a judgment dismissing the complaint, has been affirmed at the general term, and the plaintiff refuses to appeal to the court of appeals, the court may properly cancel the *lis pendens*. (*Wagner v. Perry*, 51 Hun, 199). Where a *lis pendens* has been canceled for an unreasonable neglect on the plaintiff's part to proceed, he cannot subsequently file a new notice in the same action. (*Cohen v. Ratkowsky*, 43 App. Div. 196). The notice of pendency cannot be canceled while the action is pending (*Mills v. Bliss*, 55 N. Y. 139); except as provided in section 1674, or other statute as in *Breen v. Lennon*, *supra*. It cannot be canceled because the complaint does not state facts sufficient to constitute a cause of action. (*Mills v. Bliss*, *supra*; *Brainerd v. White*, 48 Super. 399). Whether it could be canceled if the action was one in which it was not proper to file a notice of pendency, was left undecided in *Mills v. Bliss*, *supra*, but it has since been held that the court would set it aside. (*Fitzsimons v. Drought*, 15 App. Div. 413, 414; *Brox v. Riker*, 56 App. Div. 388). The notice can only be canceled by the court in which the action is pending. (*Matter of Barnum*, Daily Reg. May 29, 1884). At any time after a warrant of attachment has been vacated or annulled, or the attachment has been discharged as to real property attached, the court may, in its discretion, upon the application of any person aggrieved, and upon such notice as it deems just, direct that a notice of pendency of action, filed for the purpose of attaching the property, may be canceled of record, by the clerk of the county where it is filed and recorded. A certified copy of the order must be filed in the clerk's office, unless the order itself is entered therein, and the cancellation must be made by the clerk by a note, to that effect, on the margin of the record, referring to the order. (Co. Civ. Proc. § 711).

CHAPTER VII.

MOTIONS AND ORDERS.

- ARTICLE I.....Motions
ARTICLE II. ...Affidavits and petitions.
ARTICLE III....Notice of motion
ARTICLE IV.. .Orders to show cause.
ARTICLE V.... Stay of proceedings.
ARTICLE VI....Practice after the notice.
ARTICLE VII...Orders.
ARTICLE VIII..Costs of motion.

ARTICLE I.

MOTIONS.

SECTION.

1. Motions defined.
2. When and where made.
3. Motion papers, how prepared.

Sec. 1. Motions Defined.

A written direction of a judge or court, unless it is contained in a judgment, is an order. (Co. Civ. Proc. § 767). An application for an order is a motion. (Co. Civ. Proc. § 768). A motion is not a remedy in the sense of the code, but it is based upon some remedy, and is always connected with, and dependent upon, the principal remedy. It is to furnish relief in the progress of the action or proceeding in which it is made, and generally relates to matters of procedure, although it may be used to secure some right in consequence of the determination of the principal remedy. (*Matter of Jetter*, 78 N. Y. 601, 605). With reference to the requirement of notice, motions are divided into *ex parte* and contested. There are two kinds of contested motions, enumerated and non-enumerated motions. Enumerated motions are motions arising on special verdict; issues of law; cases; excep-

tions; appeals from judgments sustaining or overruling demurrers; appeals from judgments, or orders granting or refusing a new trial in an inferior court; appeals taken by virtue of sections 1346 and 1349 of the code; agreed cases submitted under section 1279 of the code; and appeals from final orders and decrees of surrogates' courts; and matters provided for by sections 2085, 2099, and 2138 of the code. Non-enumerated motions include all other questions submitted to the court. (General Rule 38). Only non-enumerated motions will be considered in this chapter. In addition to motions which are made in the first instance at special term, non-enumerated motions include all appeals from orders. (*Phipps v. Carman*, 26 Hun, 518).

Sec. 2. When and Where Made.

An application for an order or a motion must be made to a court, or to a judge or justice thereof. When the defendants have made default in appearing in an action or proceeding, any application or motion therein may be made to the court or to a judge or justice thereof out of court. Where any of the defendants in an action or proceeding have appeared, all motions or applications thereafter made in such action or proceedings, must be made to the court, unless such defendants consent to the making of such motion or application to a judge or justice out of court. (Co. Civ. Proc. § 768). Motions for relief on the ground of irregularity must be made at the earliest practicable term, or an excuse for the delay must be shown. (*Lawrence v. Jones*, 15 Abb. Pr. 110). This rule does not apply where a motion to vacate is upon the merits, and not for an irregularity. (*Swezey v. Bartlett*, 3 Abb. Pr. N. S. 444; *Doty v. Russell*, 5 Wend, 129). A motion to set aside a final judgment, for irregularity, cannot be heard, after the expiration of one year since the filing of the judgment roll; unless notice thereof is given for a day within the year, and either the hearing is adjourned, by one or more orders, until after the expiration of the year; or the term for which it is thus noticed, is not held. In the latter event, the motion may be re-noticed for, and heard at, the

next term at which it can be made, held not less than ten days after the day, when the first term was appointed to be held. (Co. Civ. Proc. § 1282). Motions to change the place of trial must be heard at the earliest practicable day after issue is joined (General Rule 48; *Darragh v. McKim*, 2 Hun, 337); and such motion will be denied if the moving party is guilty of laches. (*Becker v. Cherry Creek*, 77 Hun, 11; app. dismissed, 143 N. Y. 663). In actions where the trial of issues of fact is not provided for by the code of civil procedure, if either party shall desire a trial by jury, a notice of the motion for the settlement of issues must be made within ten days after issue joined. (General Rule 31). A motion to make a pleading more definite and certain, or to strike out of it matter alleged to be irrelevant, redundant, or scandalous, must be noticed before answering or demurring to the pleading, and within twenty days from its service. (General Rule 22). An extension, by stipulation or order, of the time to answer or demur waives the right to make the motion (*Brooks v. Hanchett*, 36 Hun, 70; *Post v. Blazewitz*, 13 App. Div. 124); unless the stipulation or order also reserves the right to make the motion. (*Peart v. Peart*, 48 Hun, 79). In an action in the supreme court, a motion upon notice must be made within the judicial district, in which the action is triable, or in a county adjoining that in which it is triable; except that where it is triable in the first judicial district, the motion must be made in that district; and a motion, upon notice, cannot be made in that district in an action triable elsewhere. But this section does not apply to a case, where it is specially prescribed by law that a motion may be made in a county, where the applicant, or other person to be affected thereby, or the attorney, resides. (Co. Civ. Proc. § 769). Where one motion is necessarily made in several different actions pending in different judicial districts, it may be made in one place. In such a case the old practice is preserved under rule 85. (*Phillips v. Wheeler*, 2 Hun, 603). The motions referred to in this section are those which are made in the action while it is pending, or such as relate

in some way to its pendency or procedure. (*Phillips v. Wheeler*, 67 N. Y. 104; *Curtis v. Greene*, 28 Hun, 294). A county in which the action is triable, is that which is stated as the place of trial in the summons and complaint. (*Bangs v. Selden*, 13 How. Pr. 163). Where no county is named in the summons or complaint, the motion may be made in any district in which the action is properly triable. (*Hotchkiss v. Crocker*, 15 How. Pr. 336). It need not be stated in the papers that the motion is made in the proper county; if the county in which the motion is made, is not the proper county, the objection may be taken in opposition. (*Newcomb v. Reed*, 14 How. Pr. 100). An order made in the wrong district or county is valid, however, until set aside; the court has jurisdiction to make such an order, and the irregularity does not make it void. (*Pinckney v. Hagerman*, 4 Lans. 374; *affd.* 53 N. Y. 31). A motion may be made by consent at a special term held in any county; and when so made, it is reviewable as though it were made in the proper county. (*Rice v. Ehle*, 65 Barb. 185). The section applies only to motions upon notice. (*Erismann v. Pidcock*, 62 How. Pr. 327). All non-enumerated motions are generally heard at a special term, unless when otherwise provided by law. The appellate division has jurisdiction, however, to hear and determine in the first instance any motion, contested or *ex parte* that a special term may entertain. (*Matter of Barkley etc.*, 42 App. Div. 597; *app. dis.*, 161 N. Y. 647). In affirming the jurisdiction the court says that it will be used very sparingly. Contested motions shall not be noticed or brought to a hearing at any special term held at the same time and place with a trial term, except in actions on the calendar for trial at such term, and in which the hearing of the motion is necessary to the disposal of the cause, unless otherwise ordered by the justice holding the court; and except, also, that in counties in which no special term distinct from a trial term is appointed to be held, motions in actions triable in any such county may be noticed and brought on at the time of holding the trial and special term in the county in which such actions are triable. (General Rule 38). This rule

applies only to motions, strictly so called, and not to applications which are made as the basis of a special proceeding. (*Matter of Argus Co.*, 138 N. Y. 557). Its only effect is to prescribe a rule of conduct for the guidance of attorneys. It does not prohibit a judge who is holding special term at the same time with the surrogate, from entertaining a motion noticed for that term, if, in his judgment it is proper to do so. (*Matter of Argus Co.*, *supra*). A contested motion cannot be made at a special term held at chambers, pursuant to section 239 of the code of civil procedure, unless by consent of all the parties. (Co. Civ. Proc. § 768; *Matter of Wadley*, 29 Hun, 12). In the seventh judicial district, contested motions in actions triable in any county, except Monroe, may be noticed for the equity terms in such county, but such motions will not be heard at any special term held at the same time and place with a trial term, except in actions upon the calendar for trial at such trial term, and in which the hearing of the motion is necessary to the disposal of the cause. In the first judicial district, a motion which elsewhere must be made in court, may be made to a judge out of court, except for a new trial on the merits. (Co. Civ. Proc. § 770). It will be noticed from these sections of the code, that the rule in regard to motions in the first district, is different from that which obtains in every other district. In the first judicial district, no motions can be made except in actions triable in that district; and those motions need not be made at a special term, but may be noticed and made before a judge out of court. Although this power to hear motions out of court is given the justices of the first judicial district, it is not exercised as a practical matter; the appellate division rules of the first department lay down elaborate and complete regulations for the hearing of all motions in court. In the other judicial districts, all motions must be made at a special term, and, subject to special regulations of particular districts, they may be noticed at a special term held in any county in the judicial district where the action is triable. And if that county joins a county in any other judicial district, they may

be made in such adjoining county. (Co. Civ. Proc. § 769). Where notice of a motion is given, or an order to show cause is returnable, before a judge, out of court, who, at the time fixed for the motion, is or will be absent, or unable, for any other cause, to hear it, the motion may be transferred, by his order, made before or at that time, or by the written stipulation of the attorneys for the parties, to another judge, before whom it might have been originally made. (Co. Civ. Proc. § 771).

Sec. 3. Motion Papers, How Prepared.

The papers upon which any motion is based, or all other papers to be filed or submitted to the court (except papers required to be printed), if they exceed two folios in length, shall be distinctly numbered, and marked at each folio in the margin; and all copies, either for parties or the court, shall be numbered or marked in the margin, so as to conform to the original draft or entry, and to each other, and shall be indorsed with the title of the cause. They must be fairly and legibly written, and if not so written, folioed, and indorsed, the clerk shall not file the same, nor will the court hear any motion or application founded upon them. Motion papers, as all other papers in an action, served on a party or attorney, or filed with the clerk of the court, must comply with section 796 of the code of civil procedure and must be written or printed in black characters; and no clerk of the court shall file or enter the same in his office unless they comply with this rule. The party upon whom the paper is served shall be deemed to have waived the objection for non-compliance with this rule, unless within twenty-four hours after the receipt thereof he returns such papers to the party serving the same, with a statement of the particular objection to its receipt; but this waiver shall not apply to papers required to be filed or delivered to the court. (General Rule 19). Section 796 of the code of civil procedure provides that the papers shall be plainly and legibly written or printed in black ink upon durable paper of good material and, if imprinted by typewriter, such paper shall be of linen quality equal in weight to

sixteen pounds to the double cap ream of seventeen by twenty-eight inches in size. The court will deny the motion where the papers upon which it is based, are so badly written or interlined, as to be illegible. (*Henry v. Bow*, 20 How. Pr. 215; *Johnson v. Casey*, 28 How. Pr. 492). Where an action is pending, the papers should be entitled in the action, but the objection that they are not entitled cannot be taken for the first time on appeal. (*Watts v. Nichols*, 19 Wk. Dig. 165). Copies of the affidavits and papers on which the motion is based, must be served on the adverse party with the notice of motion (General Rule 21); but if the motion is made upon pleadings which have been served upon the party, or if the papers to be used upon the motion have been served upon him, or are in his possession, it is not necessary to serve them again, but they must be referred to in the notice of motion, and it must be stated that the motion will be made upon them. (*Deutermann v. Pollock*, 36 App. Div. 522; *Badger v. Gilroy*, 21 Misc. 466; *Newbury v. Newbury*, 6 How. Pr. 182; *Van Benthuyzen v. Stevens*, 14 How. Pr. 70). The moving party can only read the affidavits and papers which have been served, or which are referred to in a notice of motion. (*Bennett v. Pratt*, 2 How. Pr. 77). If the motion is heard on papers which have not been served, it will be sufficient ground for reversing the order granted on such papers. (*Smith v. Seattle, etc. Ry. Co.*, 47 St. Rep. 283; 19 Supp. 742). Papers which have not been served cannot be read, unless they have been in the possession of the adverse party before or at the time the notice of motion was served. (*Campbell v. Grove*, 2 Johns. Cas. 105). If the moving party should discover new facts, which he desires to present to the court upon the hearing of the motion, he must serve supplementary affidavits, and postpone the hearing. (*Bergen v. Boerum*, 2 Caines, 256). If the moving party is surprised by the statements in the opposing affidavits, the court will sometimes allow the motion to stand over, that he may serve new affidavits (*Schermerhorn v. Van Voast*, 5 How. Pr. 458, 459); but this will not usually be allowed, unless the opposing affidavits contain new matter in avoidance of, and not merely in

answer to, the plaintiff's claim. (*Powell v. Clark*, 5 Abb. Pr. 70; *Jacobs v. Miller*, 10 Hun, 230). If the originals of the motion papers are sworn to and signed, and contain the jurat, it is not a fatal defect that the copies do not show it. (*Barker v. Cook*, 40 Barb. 254; *Chatham National Bank v. Merchants' National Bank*, 1 Hun, 702). An affidavit once used does not become *functus officio*, but may be used again without re-swearing. (*Mojarrieta v. Saenz*, 80 N. Y. 547, 551).

ARTICLE II.

AFFIDAVITS AND PETITIONS.

SECTION.

1. Form and contents of affidavit.
2. Special requirements of certain affidavits.
3. Before whom affidavits may be taken.
 Subd. 1.—Within the state.
 Subd. 2.—Without the state to be used within it.
4. Petitions.
5. Deposition to be used on motion.
6. Opposing affidavits.
7. Replying affidavits.

Sec. 1. Form and Contents of Affidavit.

An affidavit should always be entitled in the case. (*Baxter v. Seaman*, 1 How. Pr. 51). If no action is pending, the affidavit should not be entitled. (*People v. Tioga C. P.*, 1 Wend. 291). The title to the action includes the name of the court as well as the names of the parties (*Bowman v. Sheldon*, 5 Sand. 657); but the want of a title, or a defect in the title, of an affidavit does not impair it, if it intelligibly refers to the action or special proceeding, in which it is made. (Co. Civ. Proc. § 728). It is essential that the venue should be stated in the affidavit. (*Thompson v. Burhans*, 61 N. Y. 52, 63). The omission to state it is a fatal defect. (*Laing v. Morse*, 6 How. Pr. 394; *Cook v. Staats*, 18 Barb. 407; *Saril v. Paine*, 4 Supp. 897). But if it is made to appear by proof, outside the affidavit, that it was taken within the jurisdiction of the officer whose name is signed to it, the court may allow the jurat to be added by amendment. (*Babcock v. Kuntzsch*, 85 Hun, 33). If it ap-

appears upon the face of the affidavit that it is taken outside of the county in which the officer was authorized to take it, the court will not permit it to be read. (*Davis v. Rich*, 2 How. Pr. 86; *Sandland v. Adams*, 2 How. Pr. 127; *Snyder v. Olmsted*, 2 How. Pr. 181). The name of the deponent must be stated in the caption; but where the paper purporting to be an affidavit taken in judicial proceedings, indicates the proceeding in which it is made, has a proper venue, is subscribed by the deponent, and has a jurat in the usual form, and signed by an officer having due authority to administer an oath, the omission of the name of the deponent in the body of an instrument is not, as a general rule, a fatal defect, and the paper is effectual as an affidavit. (*People v. Sutherland*, 81 N. Y. 1). Where more than one deponent makes the affidavit, it should appear that each was sworn severally. All the facts in the affidavits should be stated after the words "being duly sworn;" all before that is mere recital and is not deemed to be any part of the facts sworn to in the affidavit. (*Staples v. Fairchild*, 3 N. Y. 41; *Payne v. Young*, 8 N. Y. 158). Facts only are to be stated in an affidavit and not inference, or arguments, or conclusions. (*Powell v. Kane*, 5 Paige, 265, 268). In stating the facts, it is the better way to distinguish between those which are stated upon knowledge, and those stated upon information and belief. In collateral proceedings, or matters of practice, where orders are applied for, judges frequently act on facts stated on information and belief. All that is required upon such proceedings is, that the information furnished by the affidavit shall be such that a person of reasonable prudence would be willing to accept and act upon it. The mere averment, however, of a fact, upon information and belief, without more, is not sufficient, but the sources of the information and the grounds of the belief must be stated, so that the judicial officer to whom the affidavit is presented, may judge whether the information and belief have a proper basis to rest on, and if he is satisfied that they have, then the affidavit is sufficient to invoke his jurisdiction and be submitted to his determination. The rule which requires an affidavit to

state the sources of the information and the ground of belief, implies that, with such statements, the affidavit will be sufficient, although the affiant has not personal knowledge of the principal facts necessary to be established. (*Buell v. Van Camp*, 119 N. Y. 160). Such affiants should, also, show that affidavits cannot be obtained from the persons from whom the affiants profess to have derived their information. (*Steuben Co. Bk. v. Alberger*, 78 N. Y. 252). There has grown up a doctrine in the first department to the effect that absolute statements in affidavits, which are presented on applications for provisional remedies, will not be deemed to be based upon personal knowledge in the absence of evidence in the affidavit from which the inference can be drawn that such personal knowledge existed (*Hoorman v. Climax Cycle Co.*, 9 App. Div. 579; *Martin v. Aluminum etc. Co.*, 44 App. Div. 412); and such allegations are held to furnish no proof of the facts alleged, although there is a positive averment of personal knowledge. (*Tucker v. Goodsell Co.*, 14 App. Div. 89). In several of the other departments, the rule seems to be exactly the opposite—that, when a positive statement is made in an affidavit, with no qualification, it is presumed to have been made on an existing personal knowledge, unless it appears affirmatively that such statements could not have been, and were not, made on such knowledge. (*James v. Richardson*, 39 Hun, 399; app. dismissed, 102 N. Y. 731; *Pierson v. Freeman*, 77 N. Y. 589; *Patterson v. Delaney*, 14 N. Y. Supp. 100; *Lacker v. Dresher*, 38 App. Div. 75; *Wicker v. Village of Elmira Heights*, 42 App. Div. 426; see, however, *Shuler v. Birdsall Mfg. Co.*, 17 App. Div. 228, *semble*). For convenience, it is better that the affidavit should be divided into paragraphs, each one of which should be confined to a distinct portion of the subject, and that every paragraph should be numbered, but this mode of making affidavits is not required by the rules. It is also better that the affidavit should be drawn up in the first person; this is required by rule of the English courts, but not in this state. It is necessary that the affidavit should be signed by the deponent. (*Hathaway v. Scott*, 11 Paige, 173; *Laimbeer v. Allen*,

2 Sand. 648). In the early case of *Jackson v. Virgil*, 3 Johns. 539), it was held that if the name of the deponent appeared in the body of the affidavit, the signature was not essential, and that the affidavit was good although he did not sign it. This case was followed in the case of *Millius v. Shafer*, (3 Den. 60); but the latter case was that of a deposition given orally before the justice of the peace, and taken down by him, and the ruling in that case is not in point in regard to affidavits. It is believed that the case of *Jackson v. Virgil*, is overruled by the two cases cited above; but it is to be noted that the case was cited with approval in 1895, by the general term of the third department in holding that, where a petition was duly signed and the name of the official who was to verify the petition recited in the affidavit of verification, a failure to sign the latter did not render the affidavit ineffective. (*Peo. v. Campbell*, 88 Hun, 547). The affidavit must be sworn to; it is indispensable that the oath should be taken, and that it should be taken before a proper officer. (*Ladow v. Groome*, 1 Den. 429). If the date of the jurat is essential, it should appear. (*Chase v. Edwards*, 2 Wend. 283). Ordinarily, however, the omission of the date of the jurat is a mere formal error and will be disregarded. (*Griffin v. Barton*, 20 App. Div. 512). The official title of the person before whom the affidavit is taken should always be given (*Jackson v. Stiles*, 3 Caines, 128); but if it is omitted, the affidavit may still be *prima facie* good, and the burden of showing that the officer had no authority to take it lies upon the opposing party. (*Hunter v. LeConte*, 6 Cow. 728). The words "before me" should always appear in the jurat, and their omission has been held to be fatal. (*Regina v. Bloxham*, 6 Q. B. 528). It will not invalidate the affidavit, if there is added to the jurat the words "to the best of deponent's knowledge, information and belief," as the general rule is that an oath taken before a competent officer verifies the truth, however stated, according to the best knowledge, information and belief of the affiant. (*Pratt v. Stevens*, 94 N. Y. 387). While it is ordinarily essential, of course, that

the jurat should be signed by the officer administering the oath, affidavits unsigned by such officer have been held valid, where there was proof that they had been actually verified. (*Sage v. Stafford*, 42 App. Div. 449).

Sec. 2. Special Requirements in Certain Affidavits.

Whenever an application is made *ex parte* on affidavit to a judge or court for an order, the affidavit shall state whether any previous application has been made for such order, and, if made, to what court or judge and what order or decision was made thereon, and what new facts, if any, are claimed to be shown. For failure to comply with this rule, any order made on such application may be revoked or set aside. This rule shall apply to proceedings supplementary to execution, and to every application for an order or judgment made in any action or special proceeding. (General Rule 25). The omission to comply with these rules is an irregularity, but the court will not always refuse to make the order, or vacate it when made, because of the omission. (*Skinner v. Steele*, 88 Hun, 307; *Pratt v. Bray*, 10 Misc. 445; *Bean v. Tonnelle*, 24 Hun, 353; *Wooster v. Bateman*, 4 Misc. 431). No order extending a defendant's time to answer or demur shall be granted, unless the party applying for such order shall present to the justice or judge to whom the application shall be made, an affidavit of merits, or proof that it has been filed, or an affidavit of the attorney or counsel retained to defend the action that from the statement of the case in the action made to him by the defendant he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof. And the affidavit shall also state the cause of action and the relief demanded in the complaint, and whether any and what extension or extensions of time to answer or demur have been granted by stipulation or order, and where any extension has been had, the date of issue shall be the same as though the answer had been served when the time to answer first expired. (General Rule 24). The order extending the time to answer, made upon an affidavit which fails to contain

the facts required by this rule, is irregular. (*Graham v. Pinckney*, 7 Robt. 147). In motions in which the defendant asks for a favor at the hands of the court, or in which the discretion of the court is invoked, it is necessary that he make an affidavit of merits. Of course, the making of an affidavit of merits may have a decided effect upon some relief thereafter asked, as a bill of particulars, for example. (*Wolff v. Kauffman*, 65 App. Div. 29). It is advisable that the defendant should swear to merits in every motion, but in motions to set aside proceedings for irregularity, an affidavit of merits is not required. (*Depeyster v. Warne*, 2 Caines, 45; *Howell v. Denniston*, 3 Caines, 97). The rules and custom have prescribed a particular form of words which must be used in an affidavit of merits, and any serious deviation from that form is a fatal defect, and it is well in all cases to adhere strictly to the form prescribed. The affidavit of merits must always be made by the defendant, unless a good excuse is shown. (Gra. Pr. 252, 253; *Mason v. Bidleman*, 1 How. Pr. 62; *Geib v. Icard*, 11 John. 82). Whenever it shall be necessary to make an affidavit of merits, the deponent must swear "that he has fully and fairly stated the case to his counsel," giving the name and place of residence of such counsel. (General Rule 23). He must also swear "that he has a good and substantial defense on the merits, as he is advised by his said counsel and verily believes." (*Mecch v. Calkins*, 4 Hill, 534; *State Bank v. Gill*, 23 Hun, 406; *Swartwout v. Hoage*, 16 John. 3; *Brittan v. Peabody*, 4 Hill, 61; *Wharton v. Barry*, 1 How. Pr. 62). If the affidavit is made by counsel, he need not swear to advice. (*Cromwell v. Van Rensselaer*, 3 Cow. 346). When the defendant sets out in his affidavit of merits the facts which constitute his defense, so that the court can see that he has a good defense upon the merits, he need not swear to the advice of counsel. (*Wilkes v. Hotchkiss*, 5 John. 360). Where it was stated in the affidavit, that the deponent had fully and fairly stated "the facts of this case," or "his case," or "this case," it was held sufficient. (*Brownell v. Marsh*, 22 Wend. 636; *Jordan v. Garrison*, 6 How. Pr. 6). It is not thought

necessary to refer to any of the large number of cases, in which a particular form of words has been held insufficient in an affidavit of merits; the cases will be found in the first volume of Abbott's Digest at pages 56 and 57, and in a note to *Brittan v. Peabody*, (4 Hill, 64, 65). Where an affidavit of merits has once been filed and served, no other is necessary. But on any subsequent motion where an affidavit of merits is needed, such service and filing must be shown by affidavit. (General Rule 23).

Sec. 3. Before Whom Affidavits may be Taken.

Subdivision 1.—WITHIN THE STATE.

An oath or affidavit, required or authorized by law; except an oath to a juror or a witness upon a trial, an oath of office, and an oath required by law to be taken before a particular officer, may be taken before a judge, clerk, deputy clerk, or special deputy clerk, of a court, a notary public, mayor, justice of the peace, surrogate, special county judge, special surrogate, county clerk, deputy county clerk, special deputy county clerk, or commissioner of deeds, within the district in which the officer is authorized to act; and when certified by the officer to have been taken before him, may be used in any court, or before any officer or other person. (Co. Civ. Proc. § 842). The word "judge" used in this section is defined to include a justice, surrogate, recorder, justice of the peace, or other judicial officer. (Co. Civ. Proc. § 3343, Sub. 3). The affidavit should not be taken before the attorney in the action, and one so taken cannot be used on an application for a provisional remedy. (*Kuh v. Barnett*, 6 Supp. 881). An affidavit may be taken, however, before the counsel in the case (*Willard v. Judd*, 15 Johns. 531); or before the partner of the attorney. (*Hallenback v. Whitaker*, 17 Johns. 2). An affidavit taken before a notary public or a commissioner of deeds, is presumptively good, although he omits to add to his title the county in which he is appointed. It would be presumed that the affidavit was taken in the county where he had jurisdiction to take

it. (*Crosier v. Cornell Steam Boat Co.*, 27 Hun, 215; *affd.* without opinion, 92 N. Y. 626; *Peo. v. Cady*, 105 N. Y. 299).

Subdivision 2.—WITHOUT THE STATE TO BE USED
WITHIN IT.

An oath or affidavit required, or which may be received, in an action, special proceeding, or other matter, may be taken without the state, except where it is otherwise specially prescribed by law, before an officer authorized by the laws of the state, to take and certify the acknowledgment and proof of deeds, to be recorded in the state; and when certified by him to have been taken before him, and accompanied with the like certificates, as to his official character and the genuineness of his signature, as are required to entitle a deed acknowledged before him to be recorded within the state, may be used as if taken and certified in this state, by an officer authorized by law to take and certify the same. (Co. Civ. Proc. § 844). The word "state" used in this section refers to this state (*Turtle v. Turtle*, 31 App. Div. 49; *Ross v. Wigg*, 34 Hun, 192); and this section applies not only to affidavits taken in other states of the union, but those taken in foreign countries. (*Id.*). An enumeration of the officers who may take affidavits without this state to be used within it, may be found in sections 249 and 250 of the Real Property law (Chap. 547, L. 1896). As to the proper form for clerk's certificate, see *Turtle v. Turtle* (31 App. Div. 49). An affidavit taken in any other country under this section is sufficient, although the jurat does not state that the officer taking it had knowledge or satisfactory evidence that the person who made it was the individual described in, or who executed, it. (*Ross v. Wigg*, *supra*). The authentication to an affidavit thus taken is sufficient, if it complies substantially with the requirements of the statutes, although it is not a literal compliance with it. (*Man. & Mer. Bank v. Cowden*, 3 Hill, 461; *Ross v. Wigg*, *supra*). The omission of the certificate as to the authority of the officer taking the affidavit, required by section 260 of the Real Property law, is a

fatal defect. (*Turtle v. Turtle*, 31 App. Div. 49; *Cream City Furniture Co. v. Squier*, 2 Misc. 438). It has been held that the omission of the certificate may be supplied by amendment (*Lawton v. Kiel*, 51 Barb. 30), but this case has been criticised. (See *Cream City Furniture Co. v. Squier*, 2 Misc. 438). It would seem that the former case is sound law. (*Fawcett v. Vary*, 59 N. Y. 597). The objection that the affidavit is not properly authenticated is waived if not taken at the hearing. (*Plympton v. Bigelow*, 11 Abb. N. C. 180; *affd.* 13 Abb. N. C. 173; *Rogers v. Rogers*, 54 App. Div. 195).

Sec. 4. Petitions.

In cases where the moving party is the affiant, the facts are sometimes brought before the court by petition. In actions which are pending, this course is not advisable, but it is better to use an affidavit. Where, however, the facts are presented to the court for the purpose of commencing a special proceeding, it is perhaps better to do so by petition than by affidavit. When a petition is used, it should be addressed to the court or judge to whom the application is to be made. (*Matter of Bookhout*, 21 Barb. 348). In regard to the title and mode of stating the facts and the signature, the same rules apply to petitions as apply to affidavits. The petition should contain, after the statement of facts, a prayer for the relief to which the petitioner deems himself entitled. It is not always necessary to be verified, but where a verification is necessary, it should be in the same form as the verification prescribed for a pleading, to which reference may be made.

Sec. 5. Deposition to be Used on Motion.

Where a party intends to make or oppose a motion in a court of record, other than a court specified in subdivision sixteen, seventeen, eighteen, or nineteen, of section two of the code, and it is necessary for him to have the affidavit or deposition of a person, not a party, to use upon the motion, the court, or a judge authorized to make an order in the cause may, in its or his discretion, make an order appointing a referee to take the deposition of that person. The order must be founded upon proof by

affidavit, that the applicant intends to make the motion, or that notice of a motion has been given, which the applicant intends to oppose. The affidavit must specify the nature of the motion, and must show that the affidavit or deposition is necessary thereon, and that such person has refused to make an affidavit of the facts, which the applicant verily believes are within his knowledge. If the defendant has appeared in the action and the application is made on the part of the plaintiff, at least one day's notice of such application must be given to the attorney of the defendant, and if the application is made on the part of the defendant, similar notice must be given to the attorney of the plaintiff. The person to be examined may be subpœnaed, and compelled to attend as upon the trial. The deposition must be taken by question and answer and be subscribed by the witness, and must be delivered to the attorney for the party who procured the order, unless the order provides for a different disposition thereof. (Co. Civ. Proc. § 885). Chapter 946 of the Laws of 1895 so altered the numbering of section 2 of the code that there are no subdivisions 16, 17 and 18; section 885 applies, therefore, to all courts of record. It will be noticed that this section does not authorize taking the deposition of a party. (*King v. Leighton*, 58 N. Y. 383; *Stubbs v. Stubbs*, 7 St. Rep. 282). The power of the court to compel a deposition for the purposes of the motion is derived entirely from the statute. (*Bacon v. Magee*, 7 Cow. 515). An application for an attachment is a motion within this section. (*Allen v. Meyer*, 73 N. Y. 1). An application for judgment in a foreclosure action is also a motion within this section. (*Eberle v. Krebs*, 50 App. Div. 450). Unless notice of the motion is given to the opposite party, he has no right to appear upon the hearing, or to interfere in it, or to move to vacate the order (*McCue v. Tribune Association*, 1 Hun, 469); unless it appears that the order is irregular, and that the irregularity has resulted in injury to the opposite party. (*Ramsey v. Gould*, 57 Barb. 398; *Brooks v. Schultz*, 3 Abb. N. S. 124). The affidavit must state the subject on which the deposition is desired, and it must

show the facts which are claimed to be within the knowledge of the witness (*Dauchy v. Miller*, 16 Abb. Pr. N. S. 100; *Williams v. Western Union Tele. Co.*, 3 Civ. Proc. Rep. 448); and the facts showing that the affidavit is necessary. (*Matter of Bannister*, 1 Law Bull. 9; *Cockey v. Hurd*, 36 Super. 42). It is not sufficient to state in the affidavit simply that the deposition is necessary on the motion. The proper and usual course, before making the application under this section, is to draft an affidavit and to present it to the party whose deposition is desired, and request him to execute it (*Fisk v. Chicago etc. R. R. Co.*, 3 Abb. Pr. N. S. 430); but the presentation of the affidavit is waived, if the witness, on being asked to make it, refuses to do so without asking that it be presented to him. (*Id.*; *Erie Railway Co. v. Gould*, 14 Abb. Pr. N. S. 279). If it appears that a person has repeatedly refused to make an affidavit, until he has had an opportunity to consult counsel, that is a sufficient refusal to sustain the order. (*Rogers v. Durant*, 2 T. & C. 676; appeal dismissed, 56 N. Y. 669). Where a person to be examined, as prescribed in this article, is a resident of the state, he shall not be required to attend in any county, other than that in which he resides, or where he has an office for the regular transaction of business, in person. Where he is not a resident he shall not be required to attend in any other county than that wherein he is served with a subpoena, unless for special reasons stated in the affidavit, the order otherwise directs. (Co. Civ. Proc. § 886). A witness who is irregularly ordered to be examined may move to vacate the order, although he is in contempt for disobedience to it (*Spratt v. Huntington*, 2 Hun, 341); but after he has appeared under the order, he cannot move to vacate it, for the reason that the affidavit on which it was granted, was insufficient. (*McCue v. Tribune Association*, 1 Hun, 469). An examination will not be arrested after it has been commenced, because the witness makes an affidavit on the subject, unless it appears that the affidavit is full and frank on all matters in question within the knowledge of the witness. (*Fisk v. Chicago R'y. Co.*, 3 Abb. N. S. 430). A fishing

examination is not allowed, nor will an examination of books and papers be permitted under this section, (*Id.*; *Wallace v. Baring*, 2 App. Div. 501); nor can the witness be examined on the general merits of the action. (*Dauchy v. Miller*, 16 Abb. Pr. N. S. 100). If the witness refuses to answer a proper question, he may be punished for contempt. (*Clark v. Brooks*, 26 How. Pr. 254).

Sec. 6. Opposing Affidavits.

If the facts stated in the moving papers are not admitted as stated, it will be necessary for the opposing party to prepare affidavits to oppose the motion, showing the facts as he claims them to be. These affidavits need not be served upon the opposite party. As to the form and contents of them, and the manner of their execution, it is sufficient to refer to what has been said in regard to the affidavits in the moving papers. A denial in the opposing affidavits of knowledge or information as to the truth of the facts alleged in the moving affidavits, is not sufficient to raise an issue as to such facts. (*Simmons v. Craig*, 137 N. Y. 550).

Sec. 7. Replying Affidavits.

The moving party will not be allowed to submit replying affidavits unless leave to do so is obtained. (*Ferguson v. Commonwealth Rubber Co.*, 74 St. Rep. 31). For a statement as to when leave will be granted see article VI, section 3, *infra*.

ARTICLE III.

NOTICE OF MOTION.

The notice of motion in the supreme court must be for the first day of the term, except in the first and second districts and motions noticed to be heard in Erie county, and shall not be for a later day, unless sufficient cause be shown for not giving notice on the first day, and the reasons must be given in the affidavits. (General Rule 21). A notice for a day later than the first is good, if sufficiently excused. (*Walrath v. Killer*, 2

Code Rep. 129). The notice of motion must be entitled in the action. (*Clickman v. Clickman*, 1 N. Y. 611). It must be accompanied with copies of the affidavits and papers on which the motion is to be made, or if they have previously been served, it should refer them (General Rule 21; Art. 1, § 3, *supra*); and papers which are not served with the notice of motion, or referred to, will not be permitted to be read upon the hearing by the moving party. The notice should specify the time and place at which the motion will be made, and a time certain should be stated. (*Crane v. Crofoot*, 1 How. Pr. 191). In stating the time the words "or as soon thereafter as counsel can be heard," are not necessary to be inserted. (*Anon.* 1 Johns. 143). If the motion is for irregularity, the notice must specify the irregularity complained of. (General Rule 37). It is not sufficient to state it in the affidavits. (*Montrait v. Hutchins*, 49 How. Pr. 105). A non-compliance with this requirement is a good ground for the denial of the motion. (*Oliver v. French*, 82 Hun, 436; *Lewis v. Graham*, 16 Abb. Pr. 126). All objections must be made in one motion. (*Mills v. Thursby*, 11 How. Pr. 114). The relief sought for in the motion should be clearly and plainly stated in the notice. If the relief is in the alternative, each alternative should be clearly specified. If costs of the motion are desired, they should be asked for. A prayer for general relief should always be added. Under this prayer, any relief consistent with the facts proved may be granted. (*People v. Nostrand*, 46 N. Y. 375; *Bissell v. N. Y. C. & H. R. R. Co.*, 67 Barb. 385; *Boston Nat. Bk. v. Armour*, 50 Hun, 176). Costs, however, will not be given upon a default under a prayer for general relief. (*Northrup v. VanDeusen*, 5 How. Pr. 134). Although there is no prayer for general relief in the notice, the court may, upon a hearing of the motion, both parties being present, give such relief beyond that asked for, as is proper, if it is fairly within the relief sought and germane to it. (*King v. Barnes*, 51 Hun, 550). A notice must be served eight days before the hearing, if served personally (Co. Civ. Proc. § 780), except that, where the attorneys for the respec-

tive parties reside or have their offices in the same city or village, only five days notice is required. (General Rule 37). If served by mail, the time is double that specified above. (Co. Civ. Proc. § 798).

ARTICLE IV.

ORDERS TO SHOW CAUSE.

If it is not practicable to give notice of the motion for the length of time required the court will sometimes in its discretion (*Sixth Ave. R. R. Co. v. Gilbert Elevated R. R. Co.*, 71 N. Y. 430), for good cause shown, make an order to show cause why the relief sought should not be granted; and, in the order, will direct that service thereof, less than such time shall be sufficient. (Co. Civ. Proc. § 780). Such an order shall in no cause be granted, unless a special and sufficient reason for requiring a shorter notice than eight days, shall be stated in the papers presented, and the party shall, in his affidavit, state the present condition of the action, and whether at issue, and, if not yet tried, the time appointed for holding the next special or trial term where the action is triable. An order to show cause shall also (except in the first judicial district) be returnable only before the judge who grants it, or at a special term appointed to be held in the district in which the action is triable. (General Rule 37). The order to show cause is only a short notice of motion. It does not change the order of hearing, nor does it indicate any opinion of the court. (*N. Y. Harlem R. R. Co. v. The Mayor*, 1 Hilt. 562; *Thompson v. Erie Ry. Co.* 9 Abb. Pr. N. S. 233). The requirements of the notice of motion as to the service of papers, and the reference to the papers to be used upon the motion, must be complied with in the order to show cause; and where the motion is for irregularity, the irregularity must be specified in the order. (General Rule 37; *Skinner v. Noyes*, 7 Robt. 228). The order may be made by the court in which the action is triable, or a judge of that court, or the county judge of the county in which the action is triable, or in which the attorney

for the plaintiff resides. (Co. Civ. Proc. § 780). It may be made by any judge or special term in any part of the state, if it is made returnable at the proper special term. (*Peo. v. Bd. of Supervisors*, 53 St. Rep. 796; *affd.* without opinion, 139 N. Y. 656). The order is discretionary. Usually where an order to show cause has been granted, the court before which it is returnable will not examine into the grounds of it, or the propriety of granting it. If no reasons are given in an affidavit, for an order to show cause, why less than eight days' notice should be required, the objection must be taken at the hearing of the motion, or it is waived. (*Wooster v. Bateman*, 4 Misc. 431). But the court hearing the motion may examine into the propriety of the granting of such an order (*Proctor v. Soulier*, 82 Hun, 353); and it may be vacated or set aside or revoked by the appellate court. (*People v. Nichols*, 79 N. Y. 583). It must be made returnable on the first day of the term, except in the first and second districts and motions noticed to be heard in Erie county (General Rule 21), unless reason is shown otherwise. (*Power v. Village of Athens*, 19 Hun, 165). If the order to show cause is made, and service less than eight days is directed, it will not be necessary to state that that service will be sufficient, as that will be assumed from the fact that such service is directed to be made. The order must be served in the way prescribed, or it will be vacated. (*Marcele v. Saltzman*, 66 How. Pr. 205).

ARTICLE V.

STAY OF PROCEEDINGS.

If it is necessary to stay proceedings in the action for any purpose until the motion is heard, the stay may be granted by the court, or by a judge. A stay of proceedings in the action can only be granted until some application for relief can be made. (*Bank of Genesee v. Spencer*, 15 How. Pr. 14; *Waring v. Yale*, 1 Hun, 492). It must be accompanied with the notice of motion, or it will not be operative, and will be vacated. (*Roosevelt v.*

Fulton, 5 Cow. 438). An order staying proceedings may be granted by the court, until the hearing and decision of the motion, although thereby proceedings may be stayed for more than twenty days (*Harris v. Clark*, 10 How. Pr. 415); but an order to stay proceedings for a longer time than twenty days, cannot be made by a judge out of court, except to stay proceedings under an order or judgment appealed from, or where it is made upon notice of the application to the adverse party, or in cases where special provision is otherwise made by law. (Co. Civ. Proc. § 775). Under this section a judge out of court cannot grant successive stays, so that the whole stay will amount to more than twenty days. (*Sales v. Woodin*, 8 How. Pr. 349). As we have seen, a judge out of court exercises only such power as is given to him by the statute, and he has no other powers. It would seem, therefore, that if a judge out of court granted an order, without notice, staying proceedings in the action for more than twenty days, either by one order or by successive orders, his action would be beyond his jurisdiction, and be void and might be disregarded, and so it has been held. (*Bangs v. Sclden*, 13 How. Pr. 374; *Spencer v. Barber*, 5 Hill, 568; *Marrin v. Lewis*, 12 Abb. Pr. 482). The distinction seems to be, that if a judge has jurisdiction to make the order, it must be obeyed until vacated, although it may be erroneous or irregular (*Roosevelt v. Fulton*, 5 Cow. 438; *Gould v. Root*, 4 Hill, 554); but if he had no jurisdiction to make the order, it may be disregarded and treated as a nullity. The proper order in such a case, is that proceedings in the action shall be stayed until the hearing and decision of the motion; and if the order is obtained from the court, that will be sufficient. And so it will be sufficient, if the motion is noticed to be heard within twenty days from the time of the making of the order. But if the order is to be obtained from a judge, and the motion is not to be heard until more than twenty days after the order is made, the usual course is to obtain from the judge, upon the motion papers, an order to show cause why proceedings should not be stayed until the hearing and decision of the motion, and staying proceedings in the action

until the return of the order to show cause. No order, except in the first judicial district, served after the action shall have been noticed for trial, if served within ten days of the trial term, shall have the effect to stay proceedings in the action, unless made at the term where such action is to be tried, or by the judge who is appointed, or is to hold such trial term, or unless such stay is contained in an order to show cause returnable on the first day of such term, in which case it shall not operate to prevent the subpœnaing of witnesses, or placing the case on the calendar. (General Rule 37). No order to stay proceedings for the purpose of moving to change the place of trial shall be granted, unless it shall appear from the papers that the defendant has used due diligence in preparing the motion for the earliest practicable day after issue joined. Such order shall not stay the plaintiff from taking any step, except subpœnaing witnesses for trial, without a special clause to that effect. (General Rule 48).

ARTICLE VI.

PRACTICE AFTER THE NOTICE.

SECTION

1. Countermanding.
2. Hearing.
3. New proofs.
4. Default.
5. Rehearing.
 - Subd. 1.—Renewal of contested motions.
 - Subd. 2.—Renewal of ex-parte applications.
6. Reargument.

Sec. 1. Countermanding.

If, after the notice has been given, the object for which it is given is attained so that the party giving it becomes entitled to the relief, the notice may be countermanded without costs (*Lisher v. Parmelee*, 1 Wend. 22); otherwise, it cannot be so countermanded as to deprive the opposite party of the right of attending to oppose and having the motion denied with costs. (*Bates v. Jaines*, 1 Duer. 668).

Sec. 2. Hearing.

Usually the order of hearing is that the moving party first reads his papers, and if the opposing party has affidavits upon his side of the case, he reads them immediately afterwards. Each party should become acquainted with the contents of his papers before the hearing. The moving party then opens the argument, is answered by the opposing party, and the moving party has the reply. If either party desires to take any preliminary objections to the papers presented by his opponent, he must take them before the papers are read, or before the motion is entertained upon the merits, or he will be deemed to waive them (*Wiley v. L. I. R. R. Co.*, 88 Hun, 177; *Roosevelt v. Dean*, 3 Caines, 105); but the preliminary objections may be reserved to be decided with the motion. (*Lowber v. Mayor*, 5 Abb. Pr. 325, 327, note). If the notice is defective, the opposing party must appear and oppose the motion on that ground, or he will be deemed to waive the defect. (*Hoyt v. Campbell*, Coleman's Cases, 129). But one counsel will be heard upon each side, upon the argument of motions, and not more than one hour each, unless the court shall otherwise order. (General Rule 47).

Sec. 3. New Proofs.

If justice requires it, the court may allow the motion to stand over, for either party to present new affidavits (*Shearman v. Hart*, 14 Abb. Pr. 358); but that will not be allowed to corroborate the affidavits served by the moving party. It is only done, when the affidavits read upon the hearing contained new matter in avoidance, or when it is evident that justice requires it. (*Jacobs v. Miller*, 10 Hun, 230). The credibility of an affiant may be impeached upon the hearing by affidavits; but, in such a case, the other party should be allowed to produce counter-affidavits to sustain him. (*Merritt v. Baker*, 11 How. Pr. 456). When it is deemed advisable to permit new proofs to be interposed, the usual course is to postpone the motion, and allow new affidavits to be served. The terms upon which this may be done are discretionary with the court. The court may, of its own

motion, or upon the application of either party, without the consent of the other, direct a reference to take proof of the facts, and to report to the court, either with or without the testimony, except where a motion arises upon the pleading. (Co. Civ. Proc. § 1015). The reference upon a motion, however, is not usual, and it is only ordered in very special cases. It is the duty of the court, wherever possible, to decide the motion upon the affidavits presented. (*Walmsley v. Horton & Co.*, 68 Hun, 549). The proceedings before the referee do not supersede the affidavits which are before the court on the motion; such proceedings merely afford an opportunity to cross-examine affiants and produce additional proof. (*Woodward v. Musgrave*, 14 App. Div. 291). The court is not bound by the facts found by the referee. (*Marshall v. Meech*, 51 N. Y. 140). Upon such a reference, the court has power to order either party to produce any of the affiants to be cross-examined by the adverse party, and it may direct that the testimony of the witness shall not be taken by commission. (*Stubbs v. Ripley*, 39 Hun, 620). The court cannot, upon the hearing of the motion, compel the adverse party to appear and be examined orally. (*Meyer v. Lent*, 7 Abb. Pr. 225).

Sec. 4. Default.

When a motion is reached in its order, if there is no opposition, the moving party may take an order for the relief asked for in his notice, upon proof of due service of the notice and papers, unless the court otherwise direct. (General Rule 37). Where the rules prescribe a special order in which motions shall be heard, defaults can only be taken at the close of that order of business. Upon a default, the court will look no further than to see that the proof of service is in due form. (*Hoyt v. Campbell*, Coleman's Cases, 129). If the proof of service is insufficient, the motion will not be granted. (*Jackson v. Giles*, 3 Caines, 88). Upon a default, only the relief specially asked for in the notice of motion can be granted. (General Rule 37; *Jones v. Cook*, 11 Hun, 231). No other relief, except that specially asked for, can be granted under the prayer for general relief. (*Northrup*

v. *Van Deusen*, 5 How. Pr. 134). Costs will not be granted on the default unless the notice of motion asks for them. (*Smith v. Fleischman*, 17 App. Div. 532). If the moving party does not appear, his adversary is entitled to an order denying the motion. (General Rule 37). The custom is to grant costs in such cases. A default taken on a motion is usually opened, as a matter of course, on excuse shown (*Thompson v. Erie Ry. Co.* (No. 3) 9 Abb. Pr. N. S. 233); unless the party suffering the default is guilty of laches in moving. (*Matter of Peekamoose Fishing Club*, 8 App. Div. 617). The terms of opening the default are always discretionary with the court.

Sec. 5. Rehearing.

Subdivision 1.—RENEWAL OF CONTESTED MOTIONS.

A motion once contested is final upon the question involved, and cannot be renewed on the facts then existing, without leave of the court. (*Sheehan v. Carvalho*, 12 App. Div. 430; *Klumpp v. Gardner*, 44 Hun, 515; *Belmont v. Erie R'y. Co.*, 52 Barb. 639; *Willet v. Fayerweather*, 1 Barb. 72). This is a mere rule of practice to avoid confusion, and the question of renewal is entirely in the discretion of the court. (*Riggs v. Pursell*, 74 N. Y. 370). The court will not usually grant leave to renew, unless upon facts which have arisen or come to the knowledge of the party moving, since the first motion was heard. (*Id.*). If it appears that the merits were not fully shown on the first motion, or there is anything to excite suspicion of unfairness, or belief that the party was taken by surprise, leave will usually be granted. (*Mitchell v. Allen*, 12 Wend. 290). If the motion is denied upon technical grounds, without a hearing upon the merits, leave to renew is frequently reserved in the order denying the motion. (*Dollfus v. Frosch*, 5 Hill, 493; *Devlin v. Hope*, 16 Abb. Pr. 314). The court may give leave to renew upon the same papers, but that will rarely be done, and only where it is clear that it is in furtherance of justice. (*White v. Munroe*, 33 Barb.

650). The motion to renew should be made to the same judge, or to a court held by the same judge. (*People v. National Trust Co.*, 31 Hun. 20, 25; *Averell v. Barber*, 44 St. Rep. 542; 18 Supp. 81). Unless leave to renew has been granted, it is error for a judge to entertain a motion which has been denied by another judge. (*Talcott v. Burnstine*, 13 St. Rep. 552). The motion should be made upon an affidavit stating the reasons for asking the renewal. It is common to join with the notice of motion for leave to renew, a further notice, that, if leave to renew is given, the motion will be made at the same term. (*Fowler v. Huber*, 7 Robt. 52). Where the new motion is made upon a state of facts, which has arisen since the first motion was decided, or upon a property right distinct from that involved in the first motion, it may be made as a matter of right; and no motion for leave to renew it, is necessary. (*Veeder v. Baker*, 83 N. Y. 156; *Steuben Co. Bank v. Alberger*, 61 How. Pr. 228; *Noonan v. N. Y., L. E. & W. R. R. Co.*, 68 Hun. 387). The fact that an appeal from the first order is pending, or that the first order has been affirmed, will not prevent granting leave to renew (*Belmont v. Erie R'y Co.*, 52 Barb. 639; *Riggs v. Pursell*, 74 N. Y. 370); but a motion to renew is a waiver of an appeal from the first order. (*Harris v. Brown*, 93 N. Y. 390). And if it is made pending the appeal, the appeal will be dismissed. (*Harrison v. Ncher*, 9 Hun, 127). It must be borne in mind, however, that there are provisions of the code of civil procedure allowing the renewal of motions without leave of the court in cases of injunction, arrest and attachment. (*Hawkins v. Pakas*, 44 App. Div. 395).

Subdivision 2.—RENEWAL OF EX PARTE APPLICATIONS.

If an application for an order, made to a judge of the court, or to a county judge, is wholly or partly refused, or granted conditionally, or on terms; a subsequent application, in reference to the same matter, and in the same stage of the proceedings, shall be made only to the same judge, or to the court. If it is made to another judge, out of court, an order granted thereupon must be vacated by the judge who made it; or, if he is absent, or

otherwise unable to hear the application, by any judge of the court, upon proof, by affidavit, of the facts. (Co. Civ. Proc. § 776). This section refers only to *ex parte* applications made to a judge out of court, but is no limitation on the powers of the court. (*People v. Cooper*, 57 How. Pr. 463). Whenever application is made *ex parte* on affidavit to a judge or court for an order, the affidavit shall state whether any previous application has been made for such order, and, if made, to what court or judge and what order or decision was made thereon, and what new facts, if any, are claimed to be shown. For failure to comply with this rule, any order made on such application may be revoked and set aside. (General Rule 25). Where an application is made to the court for judgment, it cannot be withdrawn, without the express permission of the court; and a subsequent application for judgment shall not be made, at a term held by another judge, except where the first application is so withdrawn; or where the directions, given thereupon, require an act to be done before judgment can be rendered; or where the fact of the former application is stated, and the proceedings thereupon and subsequent thereto, are fully set forth in the papers upon which the application is made. (Co. Civ. Proc. § 777). A person making an application forbidden by sections 776 and 777 with knowledge of the previous application, shall be punished by the court for a contempt. (Co. Civ. Proc. § 778).

Sec. 6. Reargument.

Strictly speaking, when a rehearing is asked upon the same papers on which the first motion was made, it is said to be a motion for reargument. When the rehearing is asked upon facts which have been omitted, or which for some reason did not appear in the first papers, it is said to be a renewal of the motion. Motions for a reargument are not encouraged by the court, and are rarely, if ever, granted, when the party moving has a remedy by appeal from the order. (*Bolles v. Duff*, 56 Barb. 567). To obtain a reargument, it must clearly appear that some material fact or principle of law which would have required the motion to be decided the other

way, was overlooked, mistaken, or misapprehended by the court. (*Matter of Crane*, 81 Hun, 96; *Bolles v. Duff*, *supra*; *Webb v. Groom*, 6 Robt. 532; *Holmes v. Rogers*, 18 St. Rep. 652; 2 Supp. 41).

ARTICLE VII.

ORDERS.

SECTION.

1. What are orders.
2. How drawn.
3. Form and contents.
4. Filing and entering.
5. When the order takes effect.
6. Notice of entry and service.
7. Conditions.
8. Vacating and modifying.

Sec. 1. What are Orders.

A direction of a court or judge, made as prescribed in the code of civil procedure, in an action or special proceeding, must be in writing, unless otherwise specified in a particular case. Such a direction, unless it is contained in a judgment, is an order. (Co. Civ. Proc. § 767). An entry by the clerk on the minutes of a direction that an action be referred is an order within the meaning of this section. (*Gerrity v. Seeger*, 163 N. Y. 119). With few exceptions, all orders may be made by the court. Certain classes of orders may be made by judges out of court. The cases in which such orders may be made, are particularly specified in the code, and will be referred to as each kind of order is the subject of discussion. The judges who may make orders out of court are specified in Chap. 1, Art. 2, § 7, ante.

Sec. 2. How Drawn.

The orders should be drawn by the party who obtains them. It is the duty of the attorney to draw the order (*Savage v. Relyea*, 3 How. Pr. 276), and to see that the order complies with the decision in every respect. (*La Farge v. Van Wagenen*, 14 How. Pr. 57). If the order is *ex parte*, it should always be submitted to the judge or court, before it is signed or allowed. If the order is

made upon a contested motion, the party drawing it should, before presenting it to the judge, submit it to the opposing party for examination. If there is any disagreement as to its terms, it should be settled by the judge, either at once, or afterwards, upon notice to the opposing party. If the order is special or complicated in its terms, a draft of the proposed order should be submitted to the opposing party, with notice of the settlement. (*Whitney v. Belden*, 4 Paige, 140). Upon the settlement of the order, the court may modify or add to the decision as announced by him. (*Post v. Cobb*, 13 St. Rep. 555). If the order as entered does not comply with the decision made by the court, the party aggrieved should apply to have it corrected. (*Hunt v. Wallis*, 6 Paige, 371). Upon a motion to correct an order, the court has no right to change the decision as made, or to make a new order. (*Siegrist v. Halloway*, 7 Civ. Proc. Rep. 58). In drawing the order, it is necessary to comply strictly with the directions of the court, as one that does not do so will be vacated as irregular. (*Williams v. Murray*, 2 Abb. Pr. N. S. 292).

Sec. 3. Form and Contents.

If the order is made by the court, it should begin with a caption, stating the term at which it is made, where and when held, and by whom. If it is made by the judge, there should be no caption, but the order should begin with the title of the action. An irregularity in this respect does not vitiate the order. (*Phinney v. Broschell*, 19 Hun, 116; affirmed 80 N. Y. 544). If the same order is made in several actions, separate orders should be entered in each action, and it is not proper to enter one order entitled, "in all the actions." (*August v. Fourth Nat. Bank*, 31 St. Rep. 85; 9 Supp. 270). All papers used or read on the motion on either side, shall be recited in the order. (General Rule 3). This rule is not satisfied by the recital that the order was made upon "all the papers and proceedings in the action." (*Hobart v. Hobart*, 85 N. Y. 637); nor upon "all the pleadings and proceedings in this action." (*Southack v. Southack*, 61 App. Div. 105). As an appeal, if taken from

the order, can only be heard upon the papers used when the order was made (Co. Civ. Proc. § 1353), and the court will look at the order itself to ascertain what those papers were, it can readily be seen that this requirement is quite important. A special term, held by another judge than the one who made the order, should not give directions as to what should be contained in the printed papers on appeal, and permit any to be left out which were used when the order was made. (*Manhattan Ry. Co. v. Taber*, 7 Misc. 347). Orders granted on petitions, or relating thereto, shall refer to such petitions by the names and descriptions of the petitioners, and the date of the petitions, if the same be dated, without reciting or setting forth the tenor or substance thereof unnecessarily. (General Rule 27). If any preliminary or other formal objections have been taken at the hearing and ruled upon by the court, and it is desired to review them upon appeal, they should appear in the recitals of the order. (*Walts v. Nichols*, 32 Hun, 276; *Merritt v. Thompson*, 1 Hilt. 550). The order as made should follow the recitals, and should be clearly and concisely expressed, and should, in all respects, follow the direction of the court. It is not usual to state in the order the grounds upon which it is made; nor is it necessary to do so (*Glines v. The Supreme Sitting of Iron Hall*, 50 St. Rep. 281; 21 Supp. 543); but, as the order itself can only be referred to for the grounds which cannot be qualified by the opinion (*Fisher v. Gould*, 81 N. Y. 230), and the right to appeal from an order sometimes depends upon the reasons for making it, in such cases, it is proper that the grounds, upon which the order is made, should be expressed in the order. Such a case exists where a motion is denied by the court for the want of power (*Tilton v. Beecher*, 59 N. Y. 176); or where, for some other reason, the motion was decided without passing upon the merits; but, ordinarily, the court will not permit the grounds upon which the order is made, to be stated in it. If the order is made by the judge, it should be signed by him. If it is a court order, it must be certified by the clerk. When the order is drawn in court, at the time at which it is made, it is not necessary, in ordinary cases,

to present it to the court for allowance, before having it certified by the clerk; but if it is drawn or made out of court, it must, before being certified by the clerk, be presented to the judge, who places upon it a direction for the clerk to enter, with his initials.

Sec. 4. Filing and Entering.

At the time of signing an order made by him, the judge usually indorses, or in some way certifies on the back of each paper used in making it, a minute that it was read on granting the order, with the date. The clerk on certifying a court order, puts a like minute or direction to file on each paper used on making the order, which has not already been filed. (General Rule 3). If made upon notice, the order must be entered and the papers filed by the prevailing party, within ten days after the delivery to him of the rough minutes and papers by the clerk, or the order may be set aside as irregular. (General Rule 3). An order or judgment directing the payment of money, or affecting the title to the property, if founded on petition, where no complaint is filed, may, at the request of any party interested, be enrolled and docketed, as other judgments. (General Rule 27). It is the duty of each attorney reading the affidavits, upon making or opposing a motion, to cause them to be delivered to the clerk to be filed; and he will be compelled to do so, upon a mere suggestion, and he cannot object that the papers used will criminate a party. (*Sinnott v. First Natl. Bk.* 34 App. Div. 161; *Anon.* 5 Cow. 13). If the prevailing party does not enter the order in twenty-four hours, the other party may do so. (*Matter of R. & C. R. R. Co.*, 8 Hun, 34). Where the order is for the benefit of both parties, either party may enter it (*Stafford v. Ambs*, 8 Abb. N. C. 237); otherwise, the defeated party has no right to enter the order before the expiration of the twenty-four hours, and if he does so, the order entered by him will not be recognized. (*Decker v. Kitchen*, 8 Wk. Dig. 537). An order made on notice by a judge out of court, must be entered and the affidavits filed. (*Savage v. Relyea*, 3 How. Pr. 276). An *ex parte* order of a judge need not be entered; but it may be dis-

regarded, unless a copy of the affidavit on which it is made, is served with a copy of the order. (*Savage v. Relyea, supra*). But judges' orders may be entered, and they must be, before an appeal can be taken from them. (Co. Civ. Proc. § 1304). Where such an order has not been so entered, or the papers upon which it was founded have not been filed in the same clerk's office, the judge who made it, or if he is absent, or unable or disqualified to act, a judge of the court, in or to which an appeal therefrom may be taken, must, upon the application of a party or other person, entitled to take such an appeal, make an order, requiring the omission to be supplied, within a specified time after service of a copy of the order made by him. Upon proof, by affidavit, that a copy of the latter order has been served, and that the omission has not been supplied, the same judge may make, upon notice, an order revoking and annulling the original order. The provisions of section 1302, Code Civil Procedure, apply to the service of an order, or a notice, as prescribed in this section. (Co. Civ. Proc. § 1304). No appeal can be taken from any order, until it has been entered. (*Star Fire Ins. Co. v. Godet*, 34 Super. 359; *Gallt v. Finch*, 24 How. Pr. 193).

Sec. 5. When the Order Takes Effect.

An order does not take effect until it is entered, if it is necessary to enter it. The court, however, will not allow a party to be prejudiced by its delay (*Clapp v. Graves*, 9 Abb. Pr. 20), or by the failure of the clerk to enter the order (*People v. Cent. City Bank*, 53 Barb. 412); and the order may be held to take effect as of the day the motion was made, or the decision rendered, by relation, if necessary to protect the rights of either party. (*McKee v. Flaherty*, 1 Law Bull. 14; *May v. Cooper*, 24 Hun, 7). The rights of parties are fixed by the decision, although the order may not be entered until later. (*Robinson v. Goners*, 138 N. Y. 425). A mistake of the clerk in entering the order will be corrected by the court. (*Church v. United Ins. Co.* 1 Caines, 7). The decision of the court is deemed to have been made when it is indorsed upon the papers and handed to the clerk. (*People*

v. *Smith*, 13 Hun, 414). Where proceedings in an action are stayed until the decision of the motion, the decision vacates the stay, although the order has not been entered (*Parmenter v. Roth*, 9 Abb. N. S. 385); but if the stay was until the further order of the court, it is not ended until the order is actually entered. (*Ackroyd v. Ackroyd*, 3 Daly, 38). Where an injunction is made with an order to show cause why it should not be continued, the injunction ceases on the return day of the order, unless it is continued by the court at the hearing. (*Middletown v. R. & O. R. R. Co.*, 12 Abb. Pr. N. S. 276). Every order which a judge or the court has power to make, must be obeyed so long as it stands, although it is erroneous or irregular. (*Gould v. Root*, 4 Hill, 554).

Sec. 6. Notice of Entry and Service.

A copy of the order, and a written notice of the entry thereof, must be served upon the opposing party, to limit the time to appeal. (Co. Civ. Proc. § 1351). If the order is made by a judge, and it is desired to bring a party into contempt for the disobedience of it, the original order with the signature of the judge must be shown at the time of service of the copy (*Rochester Lamp Co. v. Brigham*, 1 App. Div. 490; *McCauley v. Palmer*, 40 Hun, 38); except for this purpose, however, showing the original order is not necessary in making service. (*Gross v. Clark*, 1 Civ. Proc. Rep. 17). If the order is granted by the court, the original need not be served, but service of a certified copy is sufficient. (*Mayor etc. v. Conover*, 5 Abb. Pr. 244). Until the order is served, the successful party can take no advantage by it. (*Jackson v. Wilson*, 9 Johns. 265).

Sec. 7. Conditions.

Whenever a motion is addressed to its discretion, the court may impose terms as a condition of granting the motion. (*Matter of Waverly Water Works*, 85 N. Y. 478). A party may decline the conditions, but if he avails himself of the order, he cannot complain of the condition which is attached to it (*Strong v. Jones*, 25 Hun, 319); nor can he appeal from it, or move to vacate it. (*Weichsell v. Spear*, 47 Super. 223; *affd.* without

opinion, 90 N. Y. 651). If a party, in whose favor the order has been made, is not satisfied with the conditions that have been imposed upon granting it, he may appeal from that part of the order imposing conditions, but he cannot ask another special term to modify the order and set the conditions aside. (*Finelite v. Finelite*, 41 St. Rep. 158: 16 Supp. 287). Unless the order prescribes a different time, the condition must be performed within twenty-four hours (*Sabin v. Johnson*, 7 Cow. 421) from the date of the order, and not from the time of the service on the party receiving the favor. (*Willink v. Renwick*, 22 Wend. 609). The party to whom a favor is granted on terms must comply with them at his peril. If the terms are payment of costs, he must seek out the other party and tender them, if the amount is fixed, or offer to pay them when they are taxed. (*Hoffman v. Tredwell*, 5 Paige, 83; *Pugsley v. Van Allen*, 8 Johns. 352). If, as a condition, a party is required to enter into any stipulation, he should give the stipulation, and if he cannot comply with it, he should set up the inability to comply, in answer to any motion of the other party based on his failure to do so. (*Gale v. Vernon*, 4 Sand. 709). If the condition is not performed, the other party should show that fact by affidavit, and may obtain *ex parte* an absolute order, such as he would be entitled to, upon failure to perform the condition. (*Stewart v. Berge*, 4 Daly, 477).

Sec. 8. Vacating and Modifying.

An *ex parte* order made by a judge out of court may be vacated or modified by the judge who made it, either with or without notice, or by the court upon notice. (Co. Civ. Proc. § 772; *McMahon v. Brooklyn City R'y. Co.* 20 Wk. Dig. 404). If the order is wholly without jurisdiction, it may be set aside by any judge, or be disregarded. (*Kamp v. Kamp*, 59 N. Y. 212). An *ex parte* order of a judge, entitled at special term, may be vacated on notice at a special term held by any other judge. (*Matter of Brake*, 59 How. Pr. 329). One judge at special term, cannot vacate or modify an order made by any other judge at special term. (*Hallgarten v. Eckert*, 1 Hun,

117; *People v. National Trust Co.*, 31 Hun, 20; *Corbin v. Casina Land Co.*, 26 App. Div. 408); but where it is apparent that an order was made under a misapprehension of the facts, the court, at a term held by another judge, may modify it. (*Price v. Price*, 19 St. Rep. 154: 2 Supp. 796). Where a party has obtained an undue advantage, by using an order of the court for a purpose contrary to its spirit and intention, and which could have been guarded against had the unlawful purpose been disclosed when the order was made, the court has power to modify or amend the order, or grant a new order to correct the abuse of the former one. (*De Lancey v. Piepgras*, 141 N. Y. 88). An order made by a judge out of court, upon notice, may be vacated or modified by the court at special term on notice. (*West Side Bank v. Pugsley*, 47 N. Y. 368).

ARTICLE VIII.

COSTS OF MOTION.

Costs of the motion are in the discretion of the judge or court. (Co. Civ. Proc. § 3236). Where costs of a motion or any other sum of money, directed by an order to be paid, are not paid within the time fixed for that purpose by the order, or, if no time is so fixed, within ten days after service of a copy of the order, an execution against the personal property only of the party required to pay the same, may be issued, by any party or person, to whom the said costs or sum of money is made payable by said order, or in case permission of the court shall be first obtained, by any party or person having an interest in compelling payment thereof, which execution shall be in the same form, as nearly as may be, as an execution upon a judgment, omitting the recitals and directions relating to real property; and all proceedings on the part of the party required to pay the same, except to review or vacate the order, are stayed, without further direction of the court, until the payment thereof. But the adverse party may, at his election, waive the stay of proceedings. Where the order directs that the cost of a motion abide the event of the action, or where costs

of a motion, awarded by an order, have not been collected when final judgment is entered, they may be taxed as part of the costs of the action, or set off against costs awarded to the adverse party, as the case requires. (Co. Civ. Proc. § 779). The costs and disbursements on appeal from an order of the appellate division are costs of the motion, within this section. (*Phipps v. Carman*, 26 Hun, 518); so, also on an affirmance by the appellate division of a special term order denying a motion for a new trial, made upon a case and exceptions. (*McIntyre v. Bank*, 59 Hun, 536). So are costs of an interlocutory reference under section 1015. (*Jones v. Easton*, 11 Abb. N. C. 114). The stay granted by this section is an absolute and peremptory stay of all proceedings. (*National Bank of Port Jervis v. Hansee*, 15 Abb. N. C. 488). It does not, however, deprive the court of jurisdiction in further proceedings, but simply renders such proceedings irregular; it is within the power of the court to sustain such further steps taken by a party stayed under this section, conditionally upon the stayed party paying the costs. (*Wessels v. Boettcher*, 142 N. Y. 212). It does not, however, forbid a motion to vacate an order imposing costs. (*Marsh v. Woolsey*, 14 Hun, 1). The stay does not begin until default is made in the payment of the money; and if no time is fixed by the order, within ten days after personal service, or twenty days after service by mail of a copy of the order, and notice of its entry. (*Pettibone v. Drakeford*, 1 How. Pr. N. S. 141). The party entitled to insist upon the stay, waives it by giving or receiving notice of trial (*Verplanck v. Kendall*, 47 Super. 513), or by appealing from a subsequent order made in the action. (*Attorney General v. Contl. Life Ins. Co.*, 38 Hun, 521). If the objection, that the costs of a former motion have not been paid, is not made at the hearing, it will not be considered upon appeal. (*Matter of Loftus*, 41 St. Rep. 357; 16 Supp. 327). A failure to pay costs in supplementary proceedings stays only the proceedings in that matter and not general proceedings in the action. (*Godfrey v. Pell*, 5 Law Bull. 69).

CHAPTER VIII.

MISCELLANEOUS PRACTICE REGULATIONS.

- ARTICLE I.....Notices and papers.
- ARTICLE II.....Service and filing of papers.
- ARTICLE III.....Regulations respecting time.
- ARTICLE IV.....Bonds and undertakings.
- ARTICLE V.....Consolidation of actions.
- ARTICLE VI.....Interpleader.
- ARTICLE VII...Dismissal for neglect to proceed.
- ARTICLE VIII..Publication and notices.

ARTICLE I.

NOTICES AND PAPERS.

All notices given in the action must be in writing (*Lane v. Cary*, 19 Barb. 537; *McEwen v. Mont. Co. Mut. Ins. Co.*, 5 Hill, 101) ; but a notice to produce a paper, or any other notice given in the presence of the court, and at the trial, with regard to proceedings upon the trial, may be by parol. (*Kerr v. McGuire*, 28 N. Y. 446). All papers served or filed in an action must be indorsed or subscribed with the name of the attorney or attorneys, and his or their postoffice address or place of business. This rule applies to parties appearing, pursuant to rule two of the general rules. A notice not signed is a mere memorandum, and does not have any effect as a notice. (*DeMelt v. Leonard*, 19 How. Pr. 182). If notice of entry of judgment is served upon the party, a failure to indorse the name and address of the attorney will prevent its operating to limit the time to appeal. (*Kelly v. Sheehan*, 76 N. Y. 325). For any other purpose, such a defect does not vitiate either the paper or its service (*Evans v. Backer*, 101 N. Y. 289) ; but the paper so defective may be returned, or a motion may be made to set

it aside. (*Evans v. Backer, supra*). If a paper is returned because no name is signed, it must be returned to the party. (*Taylor v. Mayor of New York*, 11 Abb. Pr. 255). All papers served in the action, if they exceed two folios in length, shall be distinctly numbered, and marked at each folio in the margin thereof; and all copies, either for the parties or the court, shall be numbered or marked in the margin, so as to conform to the original draft or entry and to each other, and shall be indorsed with the title of the cause. They must all be fairly and legibly written or printed, and if not so written or printed and folioed and indorsed the clerk shall not file them, nor will the court hear any motion or application founded upon them. (General Rule 19). The party upon whom the paper is served shall be deemed to have waived the objection for non-compliance with this rule unless within twenty-four hours after the receipt thereof he returns such paper to the party serving the same with a statement of the particular objection to its receipt. (Ibid.). The objection is waived by an admission of due and proper service of the paper thus defective. (*Patterson v. McCunn*, 38 Hun, 531). General Rule 19 also provides that this waiver shall not apply to papers required to be filed or delivered to the court. A judgment which has been entered unfolioed is, nevertheless, not void, but merely irregular. (*Baptist Soc. v. Tabernacle*, 9 App. Div. 527). All stipulations must be in writing. No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent and entered, or unless the evidence thereof shall be in writing subscribed by the party against whom the same shall be alleged, or by his attorney or counsel. (General Rule 11). A stipulation made in open court is not within this rule. (*Staples v. Parker*, 41 Barb. 648). An oral stipulation made in open court before a referee, extending the referee's time to file his report, is valid. (*Ballou v. Parsons*, 55 N. Y. 673; *Sproull v. Star Co.*, 45 App. Div. 575). The time for the performance of the stipulation may be extended by parol. (*Harris v.*

Ensign, 1 How. Pr. 103). If one of the parties has relied upon a parol stipulation and taken action upon it, the party making it will not be permitted to retract it, because it is not in writing. (*M. L. Ins. Co. v. O'Donnell*, 146 N. Y. 275; *People v. Stephens*, 52 N. Y. 306, 310). The court may at any time relieve a party from his stipulation in its discretion, for good cause shown (*Barry v. Mut. Life Ins. Co. of N. Y.*, 53 N. Y. 536); but it will not do so where neither fraud nor collusion has been shown, and the stipulation has been acted upon. (*Mark v. City of Buffalo*, 87 N. Y. 184).

ARTICLE II.

SERVICE AND FILING OF PAPERS.

SECTION.

1. On whom service to be made.
2. Mode of service.
3. Proof of service.
4. Filing papers.

This article does not apply to the service of a summons, or other process; or of a paper to bring a party into contempt; or to a case where the mode of service is specially prescribed by law. (Co. Civ. Proc. § 802).

Sec. 1. On Whom Service to be Made.

If it is necessary to make service on a party who has not appeared, it must be made upon him personally. Where a party has appeared by attorney, a notice or other paper required to be served in an action, must be served upon his attorney. If a defendant has not appeared, service of a notice or other paper, in the ordinary proceedings in the action, need not be made upon him, unless he is actually confined in jail, for want of bail. (Co. Civ. Proc. § 799). An order for a discovery of books is one of the ordinary proceedings in an action under this section (*Union Trust Co. v. Driggs*, 49 App. Div. 406; *Rossner v. N. Y. Museum Association*, 20 Hun, 182); but provisional remedies are not. (*Becker v. Hager*, 8 How. Pr. 68). The word "attorney" in the action means

the attorney-at-law of the party and not an attorney-in-fact. (*Wier v. Slocum*, 3 How. Pr. 398). Where an agreement has been made to substitute an attorney, but the order for substitution has not been entered, service on the new attorney is not good. (*Wood v. Holmes*, 19 Wk. Dig. 121). Unless some other mode is prescribed, the word "service" always means personal service. (*Rathbun v. Acker*, 18 Barb. 393). Where a party to an action, who has appeared in person, resides without the state, or his residence cannot, with reasonable diligence, be ascertained, and he has not designated an address, within the state, upon the preceding papers, service of a paper upon him may be made by serving it on the clerk. (Co. Civ. Proc. § 800). If an attorney dies, is removed, or suspended, or otherwise becomes disabled to act, at any time before judgment in an action, no further proceeding will be taken in the action against the party for whom he appeared, until thirty days after notice to appoint another attorney, has been given to that party, either personally, or in such other manner as the court directs. (Co. Civ. Proc. § 65). If the new attorney is not appointed in thirty days after notice, papers in the action must be served on the party himself. (*Jewell v. Schouten*, 1 N. Y. 241).

Sec. 2. Mode of Service.

A notice or other paper in an action may be served on a party or an attorney, either by delivering it to him personally, or in the manner prescribed in the next section. (Co. Civ. Proc. § 796). Where the service is not personal, it may be made as follows:

1. Upon a party or an attorney, through the post-office, by depositing the paper, properly inclosed in a postpaid wrapper, in the postoffice, or in any postoffice box regularly maintained by the government of the United States and under the care of the postoffice of the party, or the attorney serving it, directed to the person to be served at the address, within the state, designated by him for that purpose, upon the preceding papers in the action; or, where he has not made such a designation, at his place of residence, or the place where

he keeps an office, according to the best information which can conveniently be obtained concerning the same.

2. Upon an attorney, during his absence from his office, by leaving the paper with his partner or clerk therein, or with a person having charge thereof.

3. Upon an attorney, if there is no person in charge of his office, and the service is made between six o'clock in the morning and nine o'clock in the evening, either by leaving it, in a conspicuous place in his office, or by depositing it, inclosed in a sealed wrapper, directed to him in his office letter box, or, if the office is not open, so as to admit of leaving the paper therein, and there is no office letter box, by leaving it at his residence within the state, with a person of suitable age and discretion.

4. Upon a party by leaving the paper at his residence within the state, between six o'clock in the morning and nine o'clock in the evening, with a person of suitable age and discretion. (Co. Civ. Proc. § 797).

It will be noticed that the first subdivision of section 797 authorizes service to be made through the postoffice, although both parties may reside in the same town. (*Whitney v. Haggarty*, 7 St. Rep. 766). Section 801 of the code of civil procedure providing that, in the city of New York, where a paper is served, or a return is made, through the postoffice, the deposit of the package in a branch postoffice has the same effect as a deposit in the general or principal postoffice of that city, has never been repealed, but it would seem to be superfluous in view of the amendment to section 797 (subdivision 1), authorizing the deposit of the paper to be served in any postoffice box. In making service by mail, the whole postage must be paid, and unless it is so paid the service is not good, although if a party takes the unpaid inclosure from the postoffice and examines it, he cannot then refuse to receive it because the postage is not paid. (*Clark v. McFarland*, 10 Wend. 634; *Anon*, 1 Hill 217). The papers served must be inclosed in a wrapper. (*Anon*, 1 Hill, 217). They must be deposited in the postoffice or postoffice box at the attorney's place of residence. (*Schenck v. McKie*, 4 How. Pr.

246). If they are deposited in the postoffice or postoffice box at any other place, the service is only good as a personal service from the time the paper is actually received by the party to whom it is addressed. (*Hurd v. Davis*, 13 How. Pr. 57). If they are mailed on the last day for service, they must be deposited in time to go by mail that day, or by the first mail on the next day. (*Green v. Warren*, 14 Hun, 434). The indorsement "return if not called for" to the sender, does not vitiate the service, unless it appears that because of such indorsement it was not received by the party to whom it was addressed. (*Gaffney v. Bigelow*, 2 Abb. N. C. 311). Service by mail is complete on depositing the paper in the postoffice properly inclosed and directed, as is required by section 797 (*Gates v. Guthrie*, 119 N. Y. 420; *Elliott v. Kennedy*, 26 How. 422; *Miller v. Shall*, 67 Barb. 446), although the papers are not received by the person to be served. (*Id.*; *Anon.* 1 Hill, 217; *Schwarz v. Livingston*, 46 St. Rep. 477: 18 Supp. 879). The service is invalid if the cover is not directed to the attorney at the address given by him on preceding papers. (*Seifert v. Caverly*, 63 Hun, 604). This mode of service does not apply to service of papers on the clerk of the court. (*Morris v. Morange*, 26 How. Pr. 247; *affd.* 31 How. 639). If two attorneys are in partnership, and business is done in the name of one alone, service on either out of the office is good. (*Lansing v. McKillup*, 7 Cow. 416). So if two attorneys have an office in common, one of them, if present in the office, is the person in charge, so that service on the other by delivering to the one in the office, is good. (*Crook v. Crook*, 12 St. Rep. 663). If the attorney's office is locked, procuring it to be unlocked by a person having no authority to do so, and leaving the paper in it in a conspicuous place, is not a good service (*Vail v. Lanc.* 67 Barb. 281); but it is otherwise, it seems, if leave is granted by the proper person to open the office and make the service. (*Livingston v. McIntyre*, 1 How. Pr. 253). Service by leaving the paper in a conspicuous place in the office, can only be made when the office is found unlocked. (*Haight v. Moorc*, 36 Super. 294). Service on an attorney by thrusting the

paper through a slot in the door of his office, is not good (*Livingston v. N. Y. Ele. R. R. Co.*, 58 Hun, 131; *affd.* without opinion, 125 N. Y. 695); nor by throwing it over the transom (*Claflin v. DuBois*, 13 Civ. Proc. Rep. 234; *affd.* 14 Civ. Proc. Rep. 290), but if a pleading is served in that way, and it is retained and answered, the party upon whom it is served will not be permitted to object to the mode of service. (*Rogers v. Rockwood*, 36 St. Rep. 919; 13 Supp. 939). If it is impossible to comply with the requirements of the statute in serving the paper, and the party makes the best service possible under the circumstances, and follows it up with regular service and notice of facts; that will be sufficient. (*Falconer v. Uccopell*, 2 Code Rep. 71; *Lord v. Vandenburg*, 15 How. Pr. 363).

Sec. 3. Proof of Service.

Service of all notices and papers in legal proceedings may be proved by an affidavit of service; and it is provided in section 927 of the code of civil procedure, that where it is necessary upon the trial of an action to prove the service of a notice, an affidavit showing the service to have been made by the person making the affidavit, is presumptive evidence of the service, upon first proving that he is dead or insane, or that his personal attendance cannot be compelled with due diligence. The affidavit of service must always be positive in its terms (*Doolittle v. Ward*, 3 Johns. 359), and should be made by the person who served the paper; but where the paper was served by the attorney's clerk, who had made a memorandum of the service upon it, and afterwards left the state, and was absent from it, an affidavit by the attorney, upon information derived from the clerk, was held to be sufficient. (*Jackson v. Howd*, 3 Caines, 131). It should state what was done by way of making the service. If the service is made upon the clerk of the attorney, the affidavit must show that he was such clerk at the time (*Paddock v. Beebee*, 2 Johns. Cas. 117); but it need not name him. (*Tremper v. Wright*, 2 Caines, 101). But an affidavit, stating that service was made "on defendant's attorney," not giving his name, is not sufficient to

authorize judgment by default. (*Graham v. Powers*, 22 St. Rep. 95: 9 Supp. 899). If service is made by leaving the paper in the office, the affidavit of service should state that no one was there (*Campbell v. Spencer*, 1 How. Pr. 199); and that the office was open or unlocked. (*Haight v. Moore*, 36 Super. 294). An affidavit of service by mail must state the residence of the person on whom the service was made. (*Brown v. Cook*, 2 How. Pr. 40). If it was shown that the paper was deposited in the post-office, the presumption is that it was received by the party to whom it was addressed. (*People v. Alb. Med. Col.* 26 Hun, 348). An affidavit of service is never conclusive, but it may be disproved on the motion to set the paper aside. (*Van Rensselaer v. Chadwick*, 7 How. Pr. 297). An admission of due service is conclusive that the service was proper and was made in time (*Talman v. Barnes*, 12 Wend. 227); but an admission of service only does not admit that the service was in time. (*Francis v. Sitts*, 2 Hill, 362). The signature of an attorney to an admission of service need not be proved (*Ripley v. Burgess*, 2 Hill, 360); but it is otherwise as to an admission of one not an officer of the court, whose signature to an admission must always be proved. (*Litchfield v. Burwell*, 5 How. Pr. 341). Retaining the paper, or acting upon it, is a waiver of any irregularity in its service. (*Rogers v. Rockwood*, 36 St. Rep. 919; *Georgia Lumber Co. v. Strong*, 3 How. Pr. 246).

Sec. 4. Filing Papers.

The summons, and each pleading in an action, must be filed with the clerk, by the party in whose behalf it is served, within ten days after the service thereof. If the party fails so to file it, the adverse party, on proof of the failure, is entitled, without notice, to an order from a judge, that it be filed within a time specified in the order, or be deemed abandoned. (Co. Civ. Proc. § 824). This section applies only to papers which have already been served. (*Littlefield v. Murin*, 4 How. Pr. 306). On filing papers in obedience to an order, pursuant to this section, notice need not be given. (*Douoy v. Hoyt*, 1 Co. Rep. N. S. 286). A return or other paper in a special proceeding,

where no other disposition thereof is prescribed by law, must be filed, and an order therein must be entered, with the clerk of the county in which the special proceeding is taken, if it is before a county officer, or a judge of a court established in a city; if before a justice of the supreme court, with the clerk of a county designated by the justice; or, if no designation is made by him, of a county where one of the parties resides. (Co. Civ. Proc. § 825). This section covers proceedings supplementary to execution. (*Sinnott v. First Natl. Bk.*, 34 App. Div. 161). Except where otherwise provided by law, it shall be the duty of the attorney presenting or procuring the same, forthwith to file with the proper clerk all bonds or undertakings, as required by section 816 of the code of civil procedure, and in case such bonds and undertakings shall not be so filed, the opposite party shall be at liberty to move the court to vacate the proceedings, as if no bond or undertaking had been given. It shall also be the duty of the attorney to file, within ten days after service thereof, under the like penalty, the petition or affidavit upon which an injunction, attachment, order of arrest or writ has been granted. (General Rule 4). The papers, in cases pending in the appellate division, shall be filed with the clerk of such division of the department in which the case is pending. In all other cases where no provision is made by the code, papers in the supreme court shall be filed in the office of the clerk of the county specified in the complaint as the place of trial. In surrogate's courts, in the office of the surrogate; in other courts of record, in the office of the respective clerks thereof. In case the place of trial be changed to another county, all subsequent papers shall be filed in the county to which such change is made. (General Rule 2). The court may enlarge the time to file a pleading, after an order has been made directing that it be filed or abandoned, pursuant to section 824. (*Short v. May*, 2 Sand. 639). A paper can only be filed in the clerk's office during the time designated in which it is to be kept open; and if it is filed after office hours, the filing does not become effectual until the beginning of office hours on the next day. (*Hathaway v. Howell*, 54 N. Y. 97).

ARTICLE III.

REGULATIONS RESPECTING TIME.

SECTION.

1. When service must be made.
2. How time computed.
3. Extension of time.

Sec. 1. When Service must be made.

Where special provision is not otherwise made by law, or by the general rules of practice, notice of all proceedings must, if personally served, be served at least eight days before the time appointed for the hearing. (Co. Civ. Proc. § 780). If service is made through the post-office, the time so required or allowed is double the time specified. (Co. Civ. Proc. § 798).

Sec. 2. How Time Computed.

The term "year" in the statute, means three hundred and sixty-five days, but the added day of a leap year, and the day immediately preceding shall, for the purpose of computing the year, be counted as one day. In every statute the term "year" means twelve months, the term "half year" six months, and the term "quarter of a year" three months. (Stat. Constr. Law, § 25). The term "month" means a calendar and not a lunar month. (Stat. Constr. Law, § 26). A calendar day includes the time from midnight to midnight. Sunday or any day of the week specifically mentioned means a calendar day. A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done, means such number of calendar days exclusive of the calendar day from which the reckoning is made. Sunday or a public holiday other than a half holiday, must be excluded from the reckoning if it is the last day or an intervening day of any such period of two days. In computing any specified number of days, weeks or months from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified number of days, weeks or months of time is

reckoned shall be excluded in making the reckoning. Night time includes the time from sunset to sunrise. (Stat. Constr. Law. § 27). By this section a half holiday is not to be excluded, if it is the last day, or an intervening day of any such period of two days; hence if Saturday is the last day in which an act can be done it must be done on that day. It will be noted this section provides that "the day from which an specified number of *days, weeks or months* of time is reckoned should be excluded, etc.," omitting to specify years. The Court of Appeals has held, very recently, that this omission evinces a legislative intent to lay down a different rule for computing years and that the "day from which" should not be excluded in so computing years. (*Aultman & Taylor Co. v. Syme*, 163 N. Y. 54; *Conn, Natl. Bk. v. Bayles*, 163 N. Y. 561, reversing 17 App. Div. 596). If an act is to be done within a prescribed number of days, a party has all of the last day to do it in. If it is to be done after the expiration of a prescribed number of days, it can not be done until the day after the last of those days. (*Judd v. Fulton*, 4 How. Pr. 298). The standard time is that of the seventy-fifth meridian of longitude, and all courts and public officers and official proceedings shall be regulated thereby. Any act, required by or in pursuance of law, to be performed at or within a prescribed time, shall be performed according to such standard time. (Stat. Constr. Law. § 28). The fractions of a day are not regarded, except when the hour at which a thing is done, is material. (*Marvin v. Marvin*, 75 N. Y. 240; *Douglass v. Seiferd*, 18 Misc. 188). Notice served on the 14th, for an act to be done on the 16th, is good as a two day's notice. (*Ball v. Mander*, 19 How. Pr. 468). When served on Wednesday for the following Monday, it is good where five days' notice is required. (*Taylor v. Corbier*, 8 How. Pr. 385). When an order was entered May 27th, and notice of appeal served June 27th, it was held to be served within thirty days, and good. (*Gallt v. Finch*, 24 How. Pr. 193). When an act has to be done within a limited time after a previous proceeding, the first day of the previous proceeding is to be excluded so as to give the full time after that day; as where the act

is to be done after thirty days, it must be done on the thirty-first day. (*Judd v. Fulton*, 10 Barb. 117). The provisions of the statutory construction law, cited above, apply to the statute of limitations. (*Aultman & Taylor Co. v. Syme*, 163 N. Y. 54). The period of publication of a legal notice, in an action or special proceeding brought in a court, either of record or not of record, or before a judge of such a court, must be computed so as to exclude the first day of publication, and include the day, on which the act or event, of which notice is given, is to happen, or which completes the full period of publication. (Co. Civ. Proc. § 787). A statute requiring notice to be published for six weeks successively, means that the publication must continue during the forty-two days. (*Market National Bank v. Pacific National Bank*, 89 N. Y. 397). The statute relating to foreclosure by advertisement, and prescribing twelve weeks' publication, requires that the first publication should be eighty-four days before the sale. (*Bunce v. Reed*, 16 Barb. 347). Where it is prescribed in the code, or in the general rules of practice, that a notice must be given, or a paper must be served, within a specified time, before an act is to be done; or that the adverse party has a specified time, after notice or service, within which to do an act; if service is made through the postoffice, the time so required or allowed is double the time specified. (Co. Civ. Proc. § 798). The time, under this section, begins to run from the day the paper is mailed, and not from the day of its receipt. (*Elliott v. Kennedy*, 26 How. Pr. 422.)

Sec. 3. Extension of Time.

Where the time within which a proceeding in an action after its commencement, must be taken, has begun to run, and has not expired, it may be enlarged, upon an affidavit showing grounds therefor, by the court, or by a judge authorized to make an order in the action. (Co. Civ. Proc. § 781). No order extending a defendant's time to answer or demur shall be granted, unless the party applying for such order shall present to the judge to whom the application shall be made an affidavit of

merits, or proof that it has been filed, or an affidavit of the attorney or counsel retained to defend the action that from the statement of the case in the action made to him by the defendant he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof. The affidavit shall also state the cause of action and the relief demanded in the complaint and whether any and what extension or extensions of time to answer or demur have been granted, by stipulation or order, and where any extension has been had, the date of issue shall be the same as though the answer had been served when the time to answer first expired. When the time to serve any pleading has been extended by stipulation or order for twenty days, no further time shall be granted by order, except upon two days' notice to the adverse party of the application for such order. (General Rule 24). No order extending the time to serve a case, or a case containing exceptions, or the time within which amendments thereto may be served, shall be made unless the party applying for such order serve a notice of two days upon the adverse parties of his intention to apply therefor, stating the time and place for making such application. (General Rule 32). It has been held that an order extending the time to answer may be disregarded if unsupported by an affidavit of merits (*Ellis v. Van Ness*, 14 How. 313), but this has been doubted (*First Natl. Bk. v. Ranger*, 14 Civ. Proc. Rep. 1); and an opposite conclusion reached (*Campbell v. Am. Zylonite Co.*, 53 N. Y. Super. 131). The general requirements of affidavits to procure an extension of time are stated in chapter seven, article two. Where an order has been made extending the time, pursuant to section 781, the affidavit upon which the order was granted, or a copy thereof, must be served with a copy of the order; otherwise the order may be disregarded. (Co. Civ. Proc. § 782). A county judge may make an order extending the time to answer thirty days, under section 781; and such an order does not constitute a stay of proceedings within section 775. (*Sisson v. Lawrence*, 25 How. Pr. 435). It is not necessary, unless the general

rules specifically require it, to give notice of the motion for an application to extend the time to do any act, if the time has not expired. (*Travis v. Travis*, 48 Hun, 343, Pratt, J.). The extension of the time to plead should always be for the shortest possible time, and if necessary, acceptance of short notice of trial should be made a condition of the extension. (*Haywood v. Thayer*, 10 Wend. 571). An extension of the time to answer allows a defendant to demur. (*Brodhead v. Broadhead*, 4. How. Pr. 308). It must be borne in mind, however, that such an extension does not extend the defendant's time to move with reference to the complaint—in fact, it waives all technical objections to the complaint and involves an admission that the complaint is in form to require an answer. (*Brooks v. Hanchett*, 36 Hun, 70; *Post v. Blazewitz*, 13 App. Div. 124). The extension of time begins to run from the expiration of the former time, if no other date is fixed by the terms of the stipulation. (*Pattison v. O'Connor*, 23 Hun, 307). Where service of a paper may be made by mail, a deposit of the order extending time in the postoffice on the last day is sufficient service of it. (*Schuhardt v. Roth*, 10 Abb. Pr. 203). An order staying the plaintiff's proceedings does not operate to extend the time to answer (*McGown v. Leavenworth*, 2 E. D. Smith, 24); neither does an order for a bill of particulars, with a stay of plaintiff's proceedings (*Platt v. Townsend*, 3 Abb. Pr. 9); nor does an order staying proceedings until the hearing of decision of an appeal. (*Petrie v. Fitzgerald*, 2 Abb. Pr. N. S. 354). After the expiration of the time, within which a pleading must be made, or any other proceeding in an action, after its commencement, must be taken, the court, upon good cause shown, may, in its discretion, and upon such terms as justice requires, relieve the party from the consequences of an omission to do the act, and allow it to be done; except as otherwise specially prescribed by law. (Co. Civ. Proc. § 783). A motion for leave to answer under this section must contain an affidavit of merits. (*Mitchell v. Volgar*, 1 Law Bull. 9). The courts ordinarily require that, upon a motion to open a default in pleading, the proposed pleading shall be a part of the motion papers.

It has been held, however, that this is not absolutely necessary, provided sufficient appears in the affidavits to show the nature of the pleading. (*Carey v. Browne*, 67 Hun, 516). If terms are imposed, they must be imposed when the order is made, and not subsequently. (*Matter of Bradner*, 87 N. Y. 171, 178). A court or a judge is not authorized to extend the time, fixed by law, within which to commence an action; or to take an appeal; or to apply to continue an action, where a party thereto has died, or has incurred a disability; or the time fixed by the court, within which a supplemental complaint must be made, in order to continue an action; or an action is to abate, unless it is continued by the proper parties. A court or a judge cannot allow either of those acts to be done, after the expiration of the time fixed by law, or by the order, as the case may be, for doing it; except in a case specified in section 785. (Co. Civ. Proc. § 784). The time to appeal cannot be indirectly extended by vacating the judgment, or ordering it entered anew (*Whitney v. Townsend*, 7 Hun, 233); nor can a notice of appeal be amended so as to be made to include a judgment, or order not originally included, the time to appeal from which has expired. (*Lavelle v. Skelly*, 24 Hun, 642). Where a party, entitled to appeal from a judgment or order, or to move to set aside a final judgment for error in fact, dies before the expiration of the time within which the appeal may be taken, or the motion made, the court may allow the appeal to be taken, or the motion to be made, by the heir, devisee, or personal representative, of the decedent, at any time within four months after his death. (Co. Civ. Proc. § 785).

ARTICLE IV.

BONDS AND UNDERTAKINGS.

Where a provision of this act requires a bond or undertaking, with sureties, to be given by, or in behalf of a party or other person, he need not join with the sureties in the execution thereof, unless the provision requires him to execute the same; and the execution thereof by

one surety is sufficient, although the word "sureties" is used, unless the provision expressly requires two or more sureties; and the execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond or undertaking by two sureties; and such company, if excepted to, shall justify through its officers or attorney in the manner required by law of fidelity and surety companies. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking. (Co. Civ. Proc. § 811). Although, under this section, it is within the discretion of the judge whether one or more individual sureties shall be required on an undertaking, it has been the invariable practice in the first department to require two sureties, if individuals. (*Goldmark v. Magnolia Metal Co.*, 28 App. Div. 264). Under this section, it has been held that a bond by the company authorized to execute such bonds, within the statute, is sufficient without any other surety. (*Matter of Filer*, 11 Abb. N. C. 107; *Ryan v. Cochran*, 11 Abb. N. C. 111, note). A judge is not bound to approve an undertaking guaranteed by such a corporation, although it possesses all the qualifications prescribed by the act, but he should exercise his discretion in each particular case. (*Earle v. Earle*, 49 Super. 57). A surety company incorporated under the general insurance law is limited by section 24 of that law which provides that it shall not expose itself to any loss on any one risk to an amount exceeding ten per cent of its capital and surplus. (*The Industrial & General Trust v. Tod*, 56 App. Div. 39). A failure to have an undertaking approved, does not relieve the sureties from liability upon it. (*Bennett v. Mulry*, 6 Misc. 304). In no case shall an attorney or counsellor be surety on any undertaking or bond required by law, or by the general rules of practice, or by any order of a court or judge in any action or proceeding, or be bail in any civil or criminal action, or pro-

ceeding. (General Rule 5). A bond or undertaking, executed by a surety or sureties, as prescribed in the code of civil procedure, must, where two or more persons execute it, be joint and several in form; and, except when executed by a fidelity or surety company, or when otherwise expressly prescribed by law, it must be accompanied with the affidavit of each surety, subjoined thereto, to the effect that he is a resident of and a householder or a freeholder within the state, and is worth the penalty of the bond, or twice the sum specified in the undertaking, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution. A bond or undertaking given by a party without a surety must be accompanied by his affidavit to the same effect. The bond or undertaking, except as otherwise expressly prescribed by law, must be approved by the court before which the proceeding is taken, or a judge thereof, or the judge before whom the proceeding is taken. The approval must be indorsed upon the bond or undertaking. The surety or sureties or the representatives of any surety or sureties upon the bond, heretofore or hereafter executed, of any trustee, committee, guardian, assignee, receiver, executor, administrator or other fiduciary, shall be entitled as a matter of right to be, and shall be, discharged from liability as hereinafter provided, and to that end may on notice to the principal named in such bond apply to the court that accepted such bond, or to the court of which the judge that accepted such bond was a member, or to any judge thereof, praying to be relieved from liability as such surety or sureties for the act or omission of such principal occurring after the date of the order relieving such surety or sureties hereinafter provided for, and that such principal be required to show cause why he should not account and give new sureties. Such notice of such application may be served on said principal personally within or without the state, or, not less than five days prior to the date on which such application is to be made, unless it satisfactorily appears to the court, or a judge thereof, that personal notice cannot be given with due diligence within the state, in which

case notice may be given in such manner as the court or a judge thereof directs. Pending the hearing of such application the court or judge may restrain such principal from acting except to preserve the trust estate until further order. Upon the hearing of such application if the principal does not file a new bond in the usual form to the satisfaction of the court or judge the court or judge must make an order requiring the principal to file a new bond within such reasonable time not exceeding five days, as the court or judge in such order fixes. If such new bond shall be filed upon such hearing or within the time fixed by said order the court or judge must thereupon make a decree or order requiring the principal to account for all his acts and proceedings to and including the date of such order and to file such account within a time fixed, not exceeding twenty days, and releasing the surety or sureties making such application from liability upon the bond for any act or default of the principal subsequent to the date of such decree or order. If the principal fail so to file such new bond within the time specified, a decree or order must be made revoking the appointment of such principal or removing him and requiring him to so account, and file such account within twenty days. If the principal fail to file his account as in this section provided such surety or sureties, or representatives thereof, may make and file such account with like force and effect as though made and filed by such principal, and upon the settlement thereof credit shall be given for all commissions, costs, disbursements, and allowances to which the principal would be entitled were he accounting, and allowance shall be made to such surety or sureties or representative for the expense incurred in so filing such account and procuring the settlement thereof. And after the filing of an account as required or permitted in this section, the court or judge must, upon the petition of the principal or surety or sureties, or the representatives of any such surety or sureties, issue an order requiring all persons interested in the estate or trust funds, to attend a settlement of such account at a time and place therein specified, and upon

the trust fund or estate being found or made good and paid over or properly secured, the surety or sureties shall be discharged from any and all further liability, and the court or judge shall settle, determine and enforce the rights and liabilities of all parties to the proceedings in like manner and to the same extent as in actions for an accounting in the supreme court. And upon demand made in writing by the principal such surety or sureties, or representatives thereof, shall return any compensation that has been paid for the unexpired portion of such suretyship. (Co. Civ. Proc. § 812). Surety companies may petition for release from liability under this section. (*Matter of Thurber*, 162 N. Y. 244). The requirement of this section that the undertaking shall be joint and several, is for the benefit of the obligee, and it is no defense to the sureties in an action on the undertaking, that this provision is not obeyed. (*Denike v. Denike*, 61 App. Div. 492). Whenever a court is authorized to approve an undertaking or the sureties thereto, it may direct a reference to one or more persons, designated in the order, either to make the approval, or to report the facts to the court for its action thereon. (Co. Civ. Proc. § 827). Whenever a justice or other officer approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify, or, if the security offered is by way of mortgage on real estate, to require proof of the value of such real estate. (General Rule 5). The requirement of section 812, that a surety must be worth double the amount of the undertaking, over and above all existing and contingent liabilities, does not apply to fidelity and casualty companies. (*Earle v. Earle*, 49 Super. 57). Whenever the approval of the judge is declared by statute to be essential to the sufficiency of the undertaking, it is a nullity without such approval. (*Travis v. Travis*, 48 Hun, 343). In an action brought by a foreign republic, an undertaking on arrest of the defendant, executed by the minister of the plaintiff in his official name, is sufficient. (*Republic of Mexico v. DeArangoiz*, 5 Duer, 634). It is necessary that an undertaking should in terms be binding upon

the heirs, executors, and administrators of the parties giving it. (*Schenke v. Rowell*, 1 Abb. N. C. 295). Whenever the sureties are required to justify in an amount, double that of the judgment appealed from, the amount of the judgment should be stated in the undertaking. (*Harris v. Bennett*, 3 Co. Rep. 23). The fact that they fail to justify in double the amount of the judgment, and double the five hundred dollars limited for costs and damages, does not invalidate the undertaking. (*Hill v. Burke*, 62 N. Y. 111). If the sureties upon an appeal to the appellate division from the final judgment, fail to justify after they are excepted to, or justification is not waived by the respondent, the sureties are discharged from liability. (*Manning v. Gould*, 90 N. Y. 476). If it is agreed by the attorneys that the surety on appeal should be accepted without justification, no indorsement of the approval of the surety is necessary, and the undertaking is good without it. (*Gopsill v. Decker*, 67 Barb. 211, 4 Hun, 625). A bond or undertaking, given in an action or special proceeding, as prescribed in the code, must be acknowledged or proved and certified, in like manner as a deed to be recorded. (Co. Civ. Proc. § 810). No bond or undertaking shall be received or filed, until it has been acknowledged or proved as required in this section. (General Rule 5). The acknowledgment cannot be taken before an attorney in the action or whose name appears on the undertaking as attorney. (*Bliss v. Molter*, 2 Law Bull. 21). But where the penalty of the bond, or twice the sum specified in the undertaking is five thousand dollars or upwards, the court or judge may, in its or his discretion, allow the sum in which a surety is required to justify to be made up by the justification of two or more sureties each in a smaller sum. But in that case a surety can not justify, in a sum less than five thousand dollars, and when two or more sureties are required by law to justify, the same person cannot so contribute to make up the sum for more than one of them. It shall be lawful for any party of whom a bond or undertaking is required to agree with his sureties for the deposit of any or all moneys for which such sureties are or may be held responsible with a

trust company authorized by law to receive deposits, if such deposit is otherwise proper, and for the safe keeping of any or all other depositable assets for which such sureties may be held responsible, with a safe-deposit company, authorized by law to do business as such, in such a manner as to prevent the withdrawal of such moneys and assets, or any part thereof, except with the written consent of such sureties, or an order of the court made on such notice to them, as it may direct. (Co. Civ. Proc. § 813). A bond or undertaking, required to be given by the code, must be filed with the clerk of the court; except where, in a special case, a different disposition thereof is directed by the court, or prescribed in the act. (Co. Civ. Proc. § 816). It is the duty of the attorney presenting or procuring the same, to file with the proper clerk, all bonds and undertakings required by this section; and in case such bonds and undertakings shall not be so filed, any party to the action or special proceeding shall be at liberty to move the court to vacate the proceedings or order as if no bond or undertaking had been given. (General Rule 4). A bond or undertaking, given in an action or special proceeding, as prescribed in this act, continues in force after the substitution of a new party in place of an original party, or any other change of parties; and has thereafter the same force and effect, as if then given anew, in conformity to the change of parties. (Co. Civ. Proc. § 815). A bond or undertaking, required by statute to be given by a person, to entitle him to a right or privilege, or to take a proceeding, is sufficient, if it conforms substantially to the form therefor, prescribed by the statute, and does not vary therefrom, to the prejudice of the rights of the party, to whom, or for whose benefit it is given. (Co. Civ. Proc. § 729). The omission of the penalty of a bond does not effect its validity; the only effect is to make the liability commensurate with the condition. (*Dodge v. St. John*, 96 N. Y. 260). Where such a bond or undertaking is defective, the court, officer, or body, that would be authorized to receive it, or to entertain a proceeding in consequence thereof, if

it was perfect, may, on the application of the persons who executed it, amend it accordingly; and it shall thereupon be valid, from the time of its execution. (Co. Civ. Proc. § 730). Where a bond or undertaking has been given, as prescribed by law, in the course of an action or a special proceeding, to the people or to a public officer, for the benefit of a party or other person interested and provision is not specially made by law for the prosecution thereof; the party or other person so interested may maintain an action in his own name for a breach of the condition of the bond, or of the terms of the undertaking; upon procuring an order granting him leave so to do. The order may be made by the court in which the action is or was pending; the city court of the city of New York, or a county court, if the bond or undertaking was given in a special proceeding, pending before a judge of that court; or in any other case, by the supreme court. Notice of the application therefor must be given, as directed by the court or judge, to the persons interested in the disposition of the proceeds. (Co. Civ. Proc. § 814).

ARTICLE V.

CONSOLIDATION OF ACTIONS.

Where two or more actions, in favor of the same plaintiff against the same defendant, for causes of action which may be joined, are pending in the same court, the court may, in its discretion, by order, consolidate any or all of them, into one action. (Co. Civ. Proc. § 817). When one of the actions is pending in the supreme court, and another is pending in another court, the supreme court may, by order, remove to itself the action in the other court, and consolidate it with that in the supreme court. (Co. Civ. Proc. § 818). The plaintiff may move to consolidate under these sections (*Briggs v. Gaunt*, 4 Duer, 664); but a motion by the plaintiff should not be made, until the defendants have answered or made default in both actions; and if, after answering, the plaintiff amends his complaint, the consolidation

should not be ordered, until the time to answer the amended complaint has expired. (*LeRoy v. Bedell*, 1 Code Rep. N. S.. 201). The defendant, on moving for consolidation, must show that the causes of action are such as may be joined in one action, that no defense is intended in either suit, or that the questions to arise are substantially the same in both. Where a defense is to be made, he must state enough of the nature of the actions and the defense, to show that both suits will turn upon the same questions. (*Wilkinson v. Johnson*, 4 Hill, 46). It is not enough to swear that the defense is substantially the same; it must appear that the questions to be tried are the same. (*Dunn v. Mason*, 7 Hill, 154). Even where the motion is made by the defendant, it is the better practice to wait before making the motion until after the interposition of answers. (*Boyle v. Staten Island Land Co.*, 87 Hun, 233). But see *Perkins v. Merchants' Lithographing Co.* (21 Misc. 516), and the other cases cited in this article where the court has ordered consolidation on defendant's motion before answer. An affidavit of merits is not required on the motion. (*Brewster v. Stewart*, 3 Wend. 441). If one action is pending in the supreme court, and one in another court, between the same parties, and the causes of the action might be joined, an order for removal and consolidation will be made by the supreme court, on the defendant's motion, on an affidavit showing that the questions arising in the two actions are substantially the same, though one of the actions is not at issue, and no affidavit of merits in that action is made by the defendant. (*Solomon v. Belden*, 12 Abb. N. C. 58). If two actions are brought by the same plaintiff against the same defendant, one for injury to the person, and the other for injury to the property, arising out of the same tort, they may properly be consolidated. (*Rosenberg v. Stat. I. Ry. Co.*, 38 St. Rep. 106; 14 Supp. 476. The question of consolidation is always in the discretion of the court. (*Woodward v. Frost*, 19 Wk. Dig. 125). If one action involves many questions which are not at issue in the other, the consolidation will be refused. (*Id.*). If the motion is not made until the actions are moved for trial, it will be denied

for laches. (*Eleventh Ward Sav. Bank v. Hay*, 8 Daly, 328). It was held in *Bech v. Ruggles* (6 Abb. N. C. 69), that section 817 applied only to actions at law, and that equitable actions could not be consolidated, but that case was overruled in *Wooster v. Case* (34 St. Rep. 577; 12 Supp. 769), and it was held that there is no distinction with regard to the power of the court between equitable and other actions, and that the court might, in a proper case, consolidate any actions whether they were legal or equitable. The court has no power to consolidate two actions for partition of land, situate in different counties, where one or more of the parties to one action, are not parties to, or interested in the subject, of the other action. (*Mayor v. Coffin*, 90 N. Y. 312; *Wooster v. Case*, *supra*). In the city court of the city of New York, a consolidation which permits a recovery exceeding two thousand dollars is improper. (*Gillen v. Canary*, 19 Misc. 594). Where one suit only should have been brought, or where more than one action is commenced, under circumstances which evince a disposition to make the proceedings unnecessarily burdensome to the defendant; or, where the plaintiff refuses to consolidate in a proper case, upon request, he will be charged with the costs of the motion for consolidation. (*Bk. of U. S. v. Strong*, 9 Wend. 451; *Dunning v. Bk. of Auburn*, 19 Wend. 23). It is no objection to granting a motion for consolidation of two actions, that the second cause of action had not accrued until after the first action was brought (*Carter v. Sully*, 19 Supp. 244; 28 Abb. N. C. 230), but in such a case the plaintiff is not in fault for bringing the two actions, and will not be charged with costs upon the consolidation (*Dunning v. Bank of Auburn*, *supra*), although, if the consolidation is prejudicial to him, costs or other terms may be imposed upon the defendant as a condition. (*Soloman v. Belden*, 12 Abb. N. C. 58; *Carter v. Sully*, *supra*). Where a consolidation is ordered, the successful party will only be entitled to tax the costs of one suit, unless the right to tax the costs which have accrued in the other suit, is reserved in the order. (*Blake v. Mich. So. R. R. Co.*, 17 How. Pr. 228). Where one action is

pending in New York county and another in Kings county, a motion to consolidate cannot be made in Kings county, as section 769 of the code prohibits making a motion in an action triable in the first district in any other district. The proper course is to move for a change of venue and when that is granted to move to consolidate. (*Dupigniac v. Van Buskirk*, 44 Hun, 45). Where separate actions are commenced against two or more joint and several debtors, in the same court, and for the same cause of action, the plaintiff may, in any stage of the proceedings, consolidate them into one action. (Co. Civ. Proc. § 819). Where a commission has been issued in a consolidated suit, in which the defendant joined, the evidence taken under it may be allowed to be read in the principal suit. (*Waterbury v. Delafield*, 1 Caines, 513). Where two actions are consolidated, the pleadings in both should be in the judgment roll, and it is not proper to strike out the answer in one case, because it contains the same allegations as the answer in the other. (*Colt v. Davis*, 50 Hun, 366). Where several causes in favor of the same plaintiff, though against different defendants, concerning the title of property, depend upon the same questions and the same evidence, either party may move that only one of the causes be tried, and that the others abide the event; and if the fact that the questions and evidence are the same, be not disputed by affidavit, the motion will be granted; otherwise, if that fact be denied, or appear to be doubtful. (*Jackson v. Schaubert*, 4 Cow. 78). But the rule which allows the plaintiff to try only one of the several causes where the questions and evidence are the same in all, applies only to questions of property, and does not apply to actions for a tort. (*Sherman v. McNitt*, 4 Cow. 85). Where different plaintiffs bring several distinct actions against the same defendants to establish liability upon the defendants under section 24 of the Stock Corporation Law, the actions cannot be consolidated, as they are between different parties, but, in a proper case, the court will grant an order staying the trial of all but one of the actions. (*American Grocery Co. v. Flint*, 5 App. Div. 263).

ARTICLE VI.

INTERPLEADER.

A defendant against whom an action to recover upon a contract, or an action of ejectment, or an action to recover a chattel, is pending, may, at any time before answer, upon proof, by affidavit, that a person, not a party to the action, makes a demand against him for the same debt or property, without collusion with him, apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property, or its value, to such person as the court directs; or upon it appearing that the defendant disputes, in whole or in part, the liability as asserted against him by different claimants, or that he has some interest in the subject matter of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants as co-defendants with him in the action. The court may, in its discretion, make such order, upon such terms as to costs and payments into court of the amount of the debt, or part thereof, or delivery of the possession of the property, or its value or part thereof, as may be just, and thereupon the entire controversy may be determined in the action. (Co. Civ. Proc. § 820). It is to be noted that this section now covers two distinct contingencies, providing a different remedy for each. The first is where the defendant does not dispute his liability to some one but simply cannot determine, with any reasonable degree of certainty, to which of two or more parties he is liable. In this case the court may, in its discretion, make an order substituting in the place of the defendant the person other than the plaintiff making a demand upon the defendant like that made in the action. This order, of course, the defendant can have only in case he places in the hands of the court the subject of the dispute, and the order must so provide. The second con-

tingency (which was added to the section by the amendment of 1894) is where the defendant wishes to dispute, either in whole or in part, his liability but, there being two or more claimants for the same thing, he wishes to have it determined in the one action to whom he is liable if he is liable at all. In such a case the court may, in its discretion, make an order joining the other claimant or claimants as co-defendants. In the first named contingency, there is an interpleader proper, the defendant ceases to be a party to the action, being relieved from any further responsibility in the matter and leaving the different claimants to litigate the question of who is entitled; in the contingency provided for by the amendment, there is no interpleader at all, strictly speaking, but additional parties are brought in to settle several disputes in one action. In both instances the order is within the discretion of the court and on an appeal (assuming the papers to be technically sufficient) the appellate court has before it only the question whether the discretion has been abused. (*Burritt v. Press Pub. Co.*, 25 App. Div. 141). The provision added by the amendment seems to be clear and to have given rise to practically no questions of practice. It is necessary, therefore, to consider only the matters of procedure arising under that part of the section providing for interpleader proper. The code has not introduced any new causes of interpleader. The object of this section was only to provide a summary way by which one who is entitled to interplead, might do so whenever it would have been proper before the code. (*DeLancy v. Murphy*, 24 Hun, 503). A remedy by motion is a substitute for the action, and is governed by the same rules. (*Schell v. Lowe*, 75 Hun, 43). The section applies only to actions at law. (*Lane v. N. Y. L. Ins. Co.*, 56 Hun, 92). Interpleader can be ordered, only when it is certain that the sole question is whether the plaintiff or a third person is the true owner of the property, or the fund, which is the subject of the action. If the defendant is absolutely liable to the plaintiff and is precluded from setting up the title of the third party as a defense, he

is not entitled to interplead. (*Bassett v. Leslie*, 123 N. Y. 396; *Sherman v. Partridge*, 4 Duer, 646). An action must be pending before the motion can be made under this section. If there is no action pending, the remedy is by an action of interpleader. (*Beck v. Stephani*, 9 How. Pr. 193). The proceeding under the code can be had only by a defendant, and on motion. (*B. & O. R. R. Co. v. Arthur*, 90 N. Y. 234). The motion must be made before answer, but if an unverified answer has been served and returned, the motion may be made if the time to answer has not expired. (*Howe Machine Co. v. Gifford*, 66 Barb. 597). The moving party must show; one, that two or more persons have preferred claims against him; two, that they claim the same thing, whether it is a debt or duty; three, that he has no beneficial interest in the thing claimed; and, four, that he cannot determine, without hazard to himself, to which of the claimants the thing belongs. He must also offer to bring the money or thing into court. (*Crane v. McDonald*, 118 N. Y. 648; *Bassett v. Leslie*, 123 N. Y. 396; *Burritt v. Press Pub. Co.*, 19 App. Div. 608). The motion is based upon the theory that the moving party is a mere stake holder for one or the other persons who claim the fund or property, and the case must be such that he can put or deposit the money or property in court, and be absolutely discharged from all liability to either of the claimants, and thus pass entirely out of the controversy between them. (*Bassett v. Leslie*, *supra*). He must admit his liability to some one, by reason of the claim made in the complaint. (*B. & O. R. R. Co. v. Arthur*, 90 N. Y. 234). He must be indifferent between the adverse claimants. (*Marvin v. Ellwood*, 11 Paige, 365). He must, by his affidavit, affirmatively deny any collusion with either of the parties (*Atkinson v. Manks*, 1 Cow. 691; *Crane v. McDonald*, *supra*), but a simultaneous offer to both, to pay to the one who will indemnify the defendant, will not be collusive, if both decline the offer. (*Marvin v. Ellwood*, *supra*). Collusion between other parties in regard to the matter, is no ground for denying the motion, as long as the moving party himself is free from collusion. (*Wehle v. The*

Bowery Sav. Bk., 40 Super. 97). It is not necessary for him to show that the claim of the moving party will probably succeed, but it must be made to appear that there is some plausibility in it, or such a state of facts with regard to the rights of the parties, as justifies a reasonable doubt as to the validity of the claim. (*Burritt v. Press Pub. Co.*, 19 App. Div. 608; *Mars v. Albany Sav. Bk.*, 64 Hun, 424; *Nassau Bk. v. Yandez*, 44 Hun, 55). Where an insurance company might have a defense to one of two claimants of a fund payable on a loss on the ground that an action had not been begun within the time named in the policy, it was held that an interpleader could still be had, as the company could waive such a defense if it so elected. (*Grell v. Globe & Rutgers Fire Ins. Co.*, 55 App. Div. 612). This result is reached on the principles of an ordinary bill of interpleader, the code provision containing nothing to determine this question. (*Wilson v. Duncan*, 11 Abb. Pr. 3, 8). The facts must be shown which indicate that the defendant is really placed in peril. (*Wells v. National City Bank*, 40 App. Div. 498). It is necessary to prove that the claim has some reasonable foundation. (*Stevenson v. N. Y. L. Ins. Co.*, 10 App. Div. 233). The moving party must not be a wrong doer toward either party, or in default as to either of them. (*Shaw v. Coster*, 8 Paige, 339). It must appear that he is ignorant of the rights of the adverse claimants. (*Trigg v. Hitz*, 17 Abb. Pr. 436). It will not lie where he appears to be advised as to the grounds of the different claims, and of his liability under them (*Morgan v. Fillmore*, 18 Abb. Pr. 217); or where his liability to one of the parties is based on his own act. (*Id.*). Interpleader cannot be granted, unless the money or property is brought into court (*Atkinson v. Manks*, 1 Cow. 692), and it is a sufficient answer to a motion for interpleader, that the defendant cannot deposit the amount, or property with the court. (*Vosburgh v. Huntington*, 15 Abb. Pr. 254). The motion will not be granted where he admits his liability only as to a part of a claim, and defends as to the residue (*Bender v. Sherwood*, 15 How. Pr. 258); nor where the amount admitted to be due is not the same as that

alleged in the complaint, or is in dispute (*B. & O. R. R. Co. v. Arthur*, 90 N. Y. 234; *DuBois v. Union Dime Savings Inst.*, 89 Hun, 382); nor where the claim of the third party is clearly frivolous (*Pustet v. Flannelly*, 60 How. Pr. 67); nor where there is no doubt as to which claimant the fund belongs (*Shaw v. Coster*, 8 Paige, 339); neither will it be granted if the defendant has received indemnity from either party (*Marvin v. Elwood*, 11 Paige, 365); nor where a decree of the surrogate on an accounting has determined to which of the two claimants the fund belongs. (*Baker v. Brown*, 64 Hun, 627). In actions against any savings bank to recover for moneys on deposit with it, if there be any person or persons claiming the same fund, who are not parties to the action, the court in which such action is pending may, on the petition of such savings bank, and upon eight days notice to the plaintiffs and such claimants, make an order, amending the proceedings in said action, by making such claimants parties defendant thereto; and the said court shall thereupon hear and determine the rights and interests of the several parties to the said action, in and to said funds. The said funds or deposits, which are the subject of the said action, may remain with such savings bank, upon the same interest as other deposits of like amount, to the credit of the action, until final judgment therein, and the same shall be paid by such savings bank, in accordance with the order of the court; or the deposit in controversy may be paid into court, to await the final determination of the action; and when so paid into court, the corporation shall be stricken out as a party to such action, and its liability for such deposit shall cease. The question of the costs in such actions shall in all cases, be in the discretion of the court, and they may be charged upon the fund affected by the action. (Banking Law § 115). A motion may be made under this section, after answer. (*Zabriskie v. N. Y. Sav. Bank*, Daily Reg. Apr. 30, 1881). The proceeding for interpleader under this section is a motion, and not a special proceeding. (*Bowery Sav. Bank v. Malher*, 45 Super. 619). On a motion by a

savings bank under this law the moving party must show that the claim of the person sought to be interpleaded has a reasonable foundation, or that the bank cannot decide between the claimants without hazard to it, as under section 820. (*Steiner v. East River Savings Inst.*, 60 App. Div. 232). The order of interpleader under section 820, may provide that, if the substituted party shall not, within twenty days after service of a copy of the order, and a copy of the complaint upon him, appear and defend, the deposit shall be paid to the plaintiff. *Van Buskirk v. Roy*, 8 How. Pr. 425, 427). The moving party will be allowed the costs of the action, which have accrued up to the time the motion is made, and the costs of the motion, which will usually be a charge upon, or deducted from, the fund in his hands. The order is appealable to the appellate division (Co. Civ. Proc. § 1347), but not to the court of appeals. (Co. Civ. Proc. § 190). After an order of interpleader has been made under this section, the action becomes an equitable one, triable by the court and neither party has a right to trial by jury (*Clark v. Mosher*, 107 N. Y. 118), and the costs are in the discretion of the court. (*Windecker v. Mutual Life Ins. Co.*, 12 App. Div. 73). Where a defendant not originally a party has appeared in an action and consented that an order of interpleader be made, he cannot thereafter object that the plaintiff could not have maintained an action of strict interpleader. (*Hirsch v. Mayer*, 165 N. Y. 236). Where all the claimants to the fund are parties to the action, and one of the defendants is in possession of the fund or owes the debt, the court may allow that defendant to deposit the money or property with the court and be discharged. Such an order is within the equity power of the court, although not within section 820. (*Lane v. N. Y. Li. Ins. Co.*, 56 Hun, 92).

ARTICLE VII.

DISMISSAL FOR NEGLECT TO PROCEED.

SECTION.

1. For failure to serve the summons.
2. For unreasonable neglect to proceed.

Sec. 1. For Failure to Serve the Summons.

Where, in an action against two or more defendants, the plaintiff unreasonably neglects to serve the summons upon one or more of them, without whose presence a complete determination of the controversy cannot be had, the court may, in its discretion, upon the application of a defendant who has appeared in the action, dismiss the complaint as against him and render judgment accordingly. (Co. Civ. Proc. § 821). In an action of foreclosure, where all the parties have not been served, but some have appeared and answered, those who have been served, should proceed under this section and should not notice the cause for trial. (*Morris v. Crawford*, 16 Abb. Pr. 124). One who has been served cannot move to dismiss the complaint under this section, as to a defendant not served (*Travis v. Tobias*, 7 How. Pr. 90) ; nor can the motion be made as to one not served, by another party, who claims that he is the real defendant. (*Barbour v. Boas*, 4 Law. Bull. 26).

Sec. 2. For Unreasonable Neglect to Proceed.

Where the plaintiff unreasonably neglects to proceed in the action against the defendant, or one or more defendants, against whom a separate judgment may be taken, the court may, in its discretion, upon the application of the defendant or defendants, or any of them, against whom he so neglects to proceed, dismiss the complaint as against the moving party or parties, and render judgment accordingly. (Co. Civ. Proc. § 822). Whenever an issue of fact in an action pending in any court has been joined, and the plaintiff therein shall fail to bring the same to trial according to the course and practice of the court, the defendant, at any time after younger issues shall have been tried in their regular

order, may move at special term, for the dismissal of the complaint with costs. If it be made to appear to the court, that the neglect of the plaintiff to bring the action to trial has not been unreasonable, the court may permit the plaintiff, on such terms as may be just, to bring the said action to trial at a future term. (General Rule 36). This rule in substance provides that unreasonable neglect to proceed within section 822 is, *prima facie*, neglect to bring the action to trial before younger issues have been tried in regular course; the moving party having shown such *prima facie* neglect, the burden is on his opponent to show that such neglect was not unreasonable. (*Seymour v. L. S. & M. S. R. Co.*, 12 App. Div. 300). This section applies to all actions both at law and in equity, and whether there are one or more defendants in the action. (*Jewett v. Pickersgill*, 14 Wk. Dig. 200; *Calkin v. Beattie*, 4 Law. Bull. 42). It is entirely discretionary with the court whether to dismiss the complaint under this section, or refuse to do so, and it may impose such terms upon making the order as justice requires. (*Taber v. Taber*, 60 Super. 65). The discretion is reviewable by the appellate division. (*Silverman v. Baruth*, 42 App. Div. 21). The fact that the defendant is entitled to put the cause upon the calendar, does not preclude his moving under this section, for the neglect of the plaintiff to proceed. (*Ellsworth v. Brown*, 16 Hun, 1). But his failure to put the cause on the calendar will be considered by the court in exercising its discretion. (*Graham v. Ackley*, 21 App. Div. 416). If the plaintiff does not serve the complaint within twenty days after the defendant has appeared and demanded a copy of the complaint, the remedy of the defendant is by motion to dismiss the complaint, under this section. (*Baker v. Curtiss*, 7 How. Pr. 478). If the defendant puts the cause on the calendar, and neglects to move it when reached, he waives his right to move under section eight hundred and twenty-two (*Miller v. Ring*, 18 Abb. Pr. 244); otherwise, if he merely notices the case without putting it on the calendar. (*Israel v. Voight*, 12 Misc. 206; *Chillcott v. Waddingham*, 1 Law. Bull. 50). If by

agreement of parties the case is set down for a day certain, and the court adjourns before that day, setting it down is a waiver of the defendant's right to move for a dismissal, for a failure to try at that term. (*Fuller v. Sweet*, 9 How. Pr. 74). If the motion is not made promptly after the default in moving the case, the defendant waives his right to move. (*Champion v. Webster*, 15 Abb. Pr. 4). If the delay to move the case, has been caused by repeated promises of the defendant to settle, the complaint will not be dismissed. (*Doyle v. O'Farrell*, 5 Robt. 640). The defendant cannot move to dismiss the case, if he has set up a counterclaim. (*Vessell v. Marx*, 10 Misc. 46; *Arnal v. Rahlff*, 4 Law. Bull. 3). The fact that the plaintiff's proceedings in the action are stayed by his failure to pay motion costs against him, will not prevent a dismissal of his complaint under this section (*Moloughney v. Kavanagh*, 4 Law. Bull. 43); although he may be unable to pay the costs of the motion. (*Ziegler v. Hoagland*, 52 Hun, 385; *Otis v. Gray*, 3 Law. Bull. 11). Judgment of dismissal under this section is a mere judgment of non-suit, and is no bar to a subsequent action. (*Coit v. Beard*, 33 Barb. 357). If the plaintiff excuses his failure to move, and is allowed to try his case on payment of costs, he must pay all the costs of the action, which have accrued up to the time of making the motion. (*Bowles v. Van Home*, 19 How. Pr. 346). An order granting the motion of one of three defendants to dismiss a complaint for failure to prosecute should limit the dismissal to the moving defendant. (*Paulson v. N. J. & N. Y. R. R. Co.*, 54 App. Div. 189). The court will take judicial notice of the condition of its own calendars, and the statement contained in an affidavit on such a motion to dismiss, that the plaintiff has for five years omitted to proceed with the action authorizes the inference that younger issues have been tried during that time. (*Id.*). If an appeal is taken after judgment of dismissal, the appeal must be from the order, and not from the judgment entered upon it. (*James v. Shea*, 28 Hun, 74).

ARTICLE VIII.

PUBLICATION AND NOTICE.

Where a notice or other proceeding, is required by law to be published in a newspaper published in a county, and no newspaper is published therein, or to be published oftener than any newspaper is regularly published therein, the publication may be made in a newspaper of an adjoining county, except where special provision is otherwise made by law. (Co. Civ. Proc. § 826). Where an action is brought for the collective benefit of the creditors of a person, or of an estate, or for the benefit of a person or persons, other than the plaintiff, who will come in and contribute to the expense of the action, notice of a direction of the court, contained in a judgment or order, requiring the creditors, or other person or persons to exhibit their demands, or otherwise to come in, must be published once in each week, for at least three successive weeks, and as much longer as the court directs, in the newspaper published at Albany, in which legal notices are required to be published, and in a newspaper published in the county where the act is required to be done. (Co. Civ. Proc. § 786). This section of the code only authorizes publication of notice, when an action is brought for the collective benefit of creditors. (*Schuehle v. Reiman*, 86 N. Y. 270). Where notice is published under this section, all the creditors are bound by the judgment, whether they come in and prove their claims or not, although they had in fact no knowledge of the action. (*Kerr v. Blodgett*, 48 N. Y. 62). The judgment in an action brought under the provisions of section 7 of the Personal Property Law (Laws 1897, Chap. 417) to set aside a fraudulent assignment does not bind creditors who did not participate in such action unless section 786 of the code is complied with, or some sufficient notice given. (*Matter of Thoesen & Bro.*, 62 App. Div. 87).

CHAPTER IX.

GENERAL REGULATIONS IN REGARD TO PLEADING.

- ARTICLE I.....General rules of pleading.
ARTICLE II....Formal rules concerning pleadings.
ARTICLE III...Verification of pleadings.
ARTICLE IV ..Construction of pleadings.
ARTICLE V ...Copy of account.
ARTICLE VI ...Bill of particulars.
ARTICLE VII ..Amendment of pleadings.
ARTICLE VIII..Frivolous pleadings.
ARTICLE IX ..Sham pleadings.
ARTICLE X ...Irrelevant, redundant or scandalous matter.
ARTICLE XI ...Indefinite or uncertain allegations.

ARTICLE I.

GENERAL RULES OF PLEADING.

SECTION.

1. Form.
2. What to be stated.
3. What facts to be pleaded.
4. How facts to be pleaded.
5. Exceptions to the general rules:

Sec. 1. Form.

It was a logical result of the abolition of the forms of action, and the adoption of one civil action in their stead, that the various forms of pleadings which had been considered essential to the old actions, should also be done away with. The code of procedure prescribed that all forms of pleadings theretofore existing were abolished, and that the form of pleadings in civil actions should be only those prescribed by that act. (Co. Proc. § 140). The precise wording of the rule thus established has not been retained in the code of civil procedure, but the rule

itself has been substantially preserved by section 518, in which it is stated that the forms of pleading in an action are prescribed in a chapter of which that is the first section. It is now well established that this provision of the code abolishes all forms of pleadings of every kind, which existed before its passage, and that the rules laid down in the code, apply to all actions, whether they are those formerly known as legal or equitable. (*Williams v. Hayes*, 5 How. Pr. 470; *Phillips v. Gorham*, 17 N. Y. 270). But the provisions of the code apply only to rules of pleading. It has not been attempted to alter the rules of law which determine the validity of a cause of action or defense; nor has the code attempted to abolish those rules of sound logic, by which the sufficiency of pleadings is to be determined. Rules which are purely technical, and have reference solely to the particular form of the action in which they were applied, were abolished by the code, but those which, having their foundation in reason and good sense, lend an important aid in the investigation of truth, and manifestly tend to the furtherance of justice, retain all their original force and authority. (*Fry v. Bennett*, 5 Sandf. 68, 69-71). Two objects were made prominent in the changes affected by the code; one was the introduction of verity into the pleadings, by providing in effect, that parties in their allegations should have the same regard to truth that prevails between members of society, in their daily communications with each other; that they should not willingly, and certainly not by compulsion, spread a falsehood upon the record. Another was, that the pleadings should inform the court and the adverse party of the facts alleged in support or defense of the action, and to which evidence was to be given; and hence common counts, general issues and all fictitious pleadings were abolished. One alleged objection to the old forms of pleading was, that the record did not necessarily disclose the true questions of fact at issue, and which were to be tried. (*Bush v. Prosser*, 11 N. Y. 352). It is not necessary to discuss here whether these objects have been attained, but it is be-

lieved that a careful observance of the rules contained in the code will enable the pleader to ascertain the questions in dispute in any action, and to present them for trial with complete success and accuracy. It is not the purpose of this book to discuss the general subject of pleading. No portion of that subject is germane to a book on practice, except what may be called the art of pleading, in distinction from the science; or the rules which prescribe the form in which a pleading is to be put, as distinguished from the substance of it. Although the code has abolished all forms of pleadings, still the courts have held with substantial unanimity, that a complaint which sets forth a cause of action, by the use of the common count in *assumpsit*, is good in any action in which it might have been used before the code. (*Pomeroy on Remedies*, § 542; *Allen v. Patterson*, 7 N. Y. 476; *Doherty v. Shields*, 86 Hun, 303).

Sec. 2. What to be Stated.

Facts alone should be stated. (Co. Civ. Proc. § 481, subd. 2; § 500, subd. 2; *Conaughty v. Nichols*, 42 N. Y. 86). By "facts" is meant actual occurrences provable by evidence, and from which the court can draw legal conclusions. (*Lawrence v. Wright*, 2 Duer, 673). Facts should be stated truly, as they exist. (*Russell v. Clapp*, 7 Barb. 482; *J. & S. P. R. Co. v. Morley*, 23 N. Y. 553). It is said in many cases, that facts must be set forth in a pleading according to their legal effect. This means that the pleader is to state the inferences which the law draws from the facts themselves. It is believed that this is not the rule, and that facts may be stated according to their legal effect only when, if they are so stated, the pleading remains substantially true (Moak's Van Santvoord's Pldgs. 188, 189); but not otherwise. (*Gasper v. Adams*, 28 Barb. 441). Evidence of the facts is never to be stated in a pleading. (*People v. Ryder*, 12 N. Y. 437; *Spies v. Munroe*, 35 App. Div. 527). It is not good pleading to state a fact by argument or inference. (*Boyce v. Brown*, 7 Barb. 80). It should always be stated clearly and unequivocally (*Clark v. Dillon*, 97 N. Y. 370, 374), and not hypothetically or in the

alternative. (*Boyce v. Brown*, 7 Barb. 80). But although a hypothetical pleading is rarely a good pleading, such a statement of facts is good upon the trial, and it is sometimes held to be good, upon a motion to correct the pleadings, where a denial is on information and belief (*Brown v. Ryckman*, 12 How. Pr. 313); or where a hypothetical form of pleading is used from necessity, and not for purposes of evasion. (*Dovan v. Dinsmore*, 33 Barb. 86). An allegation of a legal conclusion is one which states no facts, but merely an inference which the law makes from a fact, or group of facts. Such pleading is never admissible in lieu of statements of fact. (*Cook v. Warren*, 88 N. Y. 37, 40). In an equitable action, however, where it is necessary for a pleader to show the relation of certain acts to each other and to the end sought, conclusions of law accomplishing these purposes will not be stricken out. (*Park & Sons v. Nat. Druggists' Assn.*, 30 App. Div. 508, 515). A mere conclusion of law is bad upon demurrer. (*Knapp v. City of Brooklyn*, 97 N. Y. 520). When the pleader has stated the facts on which he relies, he is never required to state the theory of the law upon which his claim or defense is based. (*Hemmingway v. Poucher*, 98 N. Y. 281). While mere conclusions of law are not allowable in a pleading, certain allegations which are mixed allegations of law or fact have been held to be good; such as that a certain sum is due (*Allen v. Patterson*, 7 N. Y. 476); or that the party was the owner of land (*Walter v. Lockwood*, 23 Barb. 228); or that he is the owner of chattels (*Davis v. Hoppock*, 6 Duer, 254); or that the plaintiff became owner of a claim by purchase. (*Prindle v. Caruthers*, 15 N. Y. 425); or that a note was duly endorsed by an officer duly authorized (*Nelson v. Eaton*, 26 N. Y. 410); or that a corporation was duly organized (*Lorillard v. Clyde*, 86 N. Y. 384); or that the defendant was not the true owner and was not seized of the premises in fee (*Wooley v. Newcombe*, 87 N. Y. 605); or that a party duly ratified and confirmed a certain payment and elected to consider the same as made at the request and for the account and benefit of A. and to look to A. for repayment of that sum. (*Spies*

v. *Munroe*, 35 App. Div. 527). While such allegations are not fatal upon demurrer, the court upon motion will require them to be corrected. (*Prindle v. Caruthers*, *supra*).

Sec. 3. What Facts to be Pledged.

Every fact which a party must prove to establish his cause of action or defense, must be stated in the pleading (*Gurnee v. Beach*, 40 Hun, 109), and facts which are not alleged cannot be proved (*McKyring v. Bull*, 16 N. Y. 297, 303); but the facts will be sufficiently averred, to permit them to be proved on the trial, if the allegation can be fairly gathered from all the averments of the complaint, although the statement of them may be argumentative, and the complaint deficient in technical language. (*Zabriskie v. Smith*, 13 N. Y. 330; *Sanders v. Soutter*, 126 N. Y. 193). The general rule is that only the facts necessary to establish a cause of action or defense need be set forth, and the party should only allege what he is required to prove. (Moak's *Van Santvoord's Pldgs.* 238; *Decker v. Matthews*, 12 N. Y. 313, 320). But this rule is not to be construed as requiring the pleader to state only facts which entitle him to some relief. In many actions, especially those which are equitable in their nature, it is material to show, not only that the party is entitled to some relief, but to enable the court to determine the character and extent and completeness of the remedy to which he is entitled, and in such cases it is proper that the pleading should contain a statement of all the facts upon which the relief depends, or which influence or modify it. (*People v. Ryder*, 12 N. Y. 433, 438). Since these classes of facts assist in determining the nature, amount and details of the relief to be awarded, they in part at least, "constitute the cause of action," within the true meaning of the term, and must be alleged. While the material facts of an equitable cause of action differ in the manner thus described, from the issuable facts of a legal cause of action, the single and comprehensive principle of the reformed procedure embraces and controls both classes of suits. (*Pomeroy on Remedies*, § 527). A fact which the law implies, or a

presumption of law need not be alleged. (*Hunt v. Bennett*, 19 N. Y. 173, 176). But the allegation of a necessary fact is not dispensed with because it may be inferred from another fact which is alleged. (*Parkhurst v. Wolf*, 47 Super. 320). The public statutes of the state, or of the United States need not be pleaded (*Brown v. Harman*, 21 Barb. 508; *Platt v. Crawford*, 8 Abb. Pr. N. S. 297); but private or local statutes (*Bretz v. Mayor, etc.*, 6 Robt. 325), or a municipal ordinance (*Harker v. Mayor, etc.*, 17 Wend. 199), or the law of another state or country (*Throop v. Hatch*, 3 Abb. Pr. 23), must be pleaded as facts. If, however, a private statute contains provisions of a general nature, such provisions need not be pleaded. It is unnecessary to state in the pleading any fact of which the court will take judicial notice (*Shaw v. Tobias*, 3 N. Y. 188); such as public statutes of this state (*Bayard v. Smith*, 17 Wend. 88); or of the United States (*Jack v. Martin*, 12 Wend. 311, 329); or the civil divisions of this state (*Chapman v. Wilber*, 6 Hill, 475); or matters of public history of the country (*Swinnerton v. Columbian Ins. Co.*, 37 N. Y. 174); or the prominent geographical features of the state or country (*People v. Snyder*, 41 N. Y. 397); or treaties or proclamations (*United States v. Reynes*, 9 How. 127); or seals of foreign states (*Lazier v. Westcott*, 26 N. Y. 146), or its own officers, or their signatures (*Mackinnon v. Barnes*, 66 Barb. 91); the meaning of English words, terms of art, legal weights and measures, etc. It is not necessary to allege what the law will presume (*Hunt v. Bennett*, 19 N. Y. 173), as that a man is innocent, or of good character, or has the capacity to contract, or that he has not been negligent in the performance of a duty, or that his business has been transacted legally; and if these facts are to be put in issue, the contrary averment must come from the other side. (1 Chitty Pl. 226, marg.).

Sec. 4. How Facts to be Pleaded.

Subdivision 1.—CERTAINTY.

The code requires that each pleading should contain a plain and concise statement of the facts, constituting

the cause of action or defense, without unnecessary repetition. (Co. Civ. Proc. § 481, subd. 2; § 500, subd. 2). The material facts ought to be plainly yet concisely alleged, and with all necessary and convenient certainty, as to the essential circumstances of time, place, manner and other instances. (Story Eq. Plead. § 23). The statute requires that the allegations of the pleading must be so definite and certain that the precise meaning and application of it will be apparent. (Co. Civ. Proc. § 546).

Subdivision 2.—TIME.

Under the former practice it was necessary to state the time whenever any material or traversable fact happened, but generally, it was not necessary to prove the time as alleged, unless it constituted a material part of the cause of action. (1 Chitt. Plead. 257, marg.). The rule under the code is, if the time when a fact happened is material to constitute the cause of action or defense, it must be stated, and the fact without the time, would be insufficient to constitute the cause of action or defense, but if the time is immaterial, a demurrer would not lie for omitting to state it. (*People v. Ryder*, 12 N. Y. 439). Where an act was capable of being committed on several days, it may be described as having been committed on such a day, and divers other days and times, between that day and the commencement of the action. Under such allegations, several different injuries may be proved, and if the party give evidence of one, he is not restricted to that, and may, be even allowed to prove acts prior to the date named in the complaint. (*Dubois v. Beaver*, 25 N. Y. 123; *Moak's Van Santvoord's Pldgs.* 222). If the only materiality of the time is, that it was after another date, it is sufficient to say that it is so. (*Kellogg v. Baker*, 15 Abb. Pr. 286). In a verified pleading, allegations in the present tense relate to the date of verification. (*Prindle v. Caruthers*, 15 N. Y. 425). If a pleading is not verified, all allegations of time, whether in past or present tense, are construed to relate to the commencement of the action. (*Burns v. O'Neil*, 10 Hun, 494; *Townshend v. Norris*, 7 Hun, 239).

Subdivision 3.—PLACE.

At common law it was necessary to allege a place, in reference to every traversable fact, and that place, wherever the fact occurred, was always charged as being within the county where the cause was to be tried. The obligation under the code to state the facts truly, forbids a fictitious venue, and unless the place is material, it does not become one of the facts which constitute the cause of action. But actions are still divided into local and transitory, and as to the former, the issues must be tried in the county where the cause of action arose. The statutes of the state provide for the classes of actions which require such trial, and they generally are made to conform to local actions at common law. Thus, actions in regard to real property, that may affect its title or possession are triable in the county where it is situated, and the pleading must show that the property lies in that county. (Bliss on Code Pleadings, § 284). Wherever an allegation of the place is material to the cause of action and the jurisdiction of the court, or whenever it is matter of description, the place should be stated in the pleading, but whenever it is immaterial, no allegation need be made about it. (Bliss on Code Pleadings, § 296).

Subdivision 4.—POSITIVENESS.

Every fact which is stated in the pleading should be positively averred (*Truscott v. Dole*, 7 How. Pr. 221; *Hilsen v. Libby*, 44 Super. 12, 15); and as we have seen, not by argument, or inference, or hypothetically; nor should it be averred by way of recital; and under the old practice, the defendant was not bound to answer any allegation made in that way. (*Mechanics' Bank v. Levy*, 3 Paige, 606). But on demurrer, or at the trial, matters recited in the pleading (*Price v. McClave*, 6 Duer, 544), or facts recited in a document which is set out in the pleading, and the execution of which is alleged (*Slack v. Heath*, 1 Abb. Pr. 331; 4 E. D. Smith, 95), or all matters which can be implied by fair and reasonable intentment from facts which are alleged (*Marie v. Garrison*, 83 N. Y. 14, 23), will be deemed to be properly alleged.

The remedy for such defects is by motion to make the pleading definite and certain, before an answer or demurrer is served. Facts may be stated upon information and belief (*St. John v. Beers*, 24 How. Pr. 377), although they are within the knowledge of the pleader. (*N. Y. Mar. Iron Works v. Smith*, 4 Duer, 362, 374). If the facts are not within the knowledge of the pleader, yet they may be stated on his belief, without stating that the allegation is upon information. (*Radway v. Mather*, 5 Sandf. 654). The allegations or denials in a verified pleading must, in form, be stated to be made by the party pleading. Unless they are therein stated to be made upon the information and belief of the party, they must be regarded for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information to form a belief, with respect to a matter, must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information. (Co. Civ. Proc. § 524).

Sec. 5. Exceptions to the General Rules.

Subdivision 1.—PRIVATE STATUTES.

In pleading a private statute, or a right derived therefrom, it is sufficient to designate the statute by its chapter, year of passage, and title, or in some other manner with convenient certainty, without setting forth any of the contents thereof. (Co. Civ. Proc. § 530). This section of the statute does not relieve the pleader from the necessity of pleading the statute, but it is not now necessary to count on it, that is, to set it out in full. It is sufficient to refer to it in the general way provided for in this section. (Bliss on Code Plead. § 304).

Subdivision 2.—ACCOUNT.

It is not necessary for a party to set forth in a pleading, the items of an account therein alleged; but in that case, he must deliver to the adverse party, within ten

days after a written demand thereof, a copy of the account, which, if the pleading is verified, must be verified by his affidavit, to the effect that he believes it to be true; or, if the facts are within the personal knowledge of the agent or attorney for the party, or the party is not within the county where the attorney resides, or capable of making the affidavit, by the affidavit of the agent or attorney. If he fails so to do, he is precluded from giving evidence of the account. The court, or a judge authorized to make an order in the action, may direct the party to deliver a further account, where the one delivered is defective. (Co. Civ. Proc. § 531).

Subdivision 3.—JUDGMENTS.

In pleading a judgment, or other determination, of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must on the trial, establish the facts conferring jurisdiction. (Co. Civ. Proc. § 532). It is doubtful whether this section applies to judgments of foreign states. In *Halstead v. Black* (17 Abb. Pr. 227), the plaintiff set out a judgment of a foreign state in the manner directed by this section, and upon demurrer, the supreme court at special term, held that the pleading was good, and that this section applied to foreign judgments. The case of *Hollister v. Hollister* (10 How. Pr. 532), was cited in *Halstead v. Black*, but that case, as was stated, did not decide the question, but assumed that the section did not apply to foreign judgments. In the case of *McLaughlin v. Nichols*, (13 Abb. Pr. 244), it was held that, in suing upon a foreign judgment, the facts must be stated, showing the jurisdiction of the person and subject matter, and either that the court which rendered the judgment was a court of general jurisdiction, or if not so, that it had acquired jurisdiction of the person and subject matter in the particular case, but in that case, it was assumed that the proper construction of this provision of the statute was not before the court. In the

case of *DeNobele v. Lee* (47 Super. 372), it was said that the question whether this section applied to foreign judgments, was yet undecided, and that the rule upon that point was doubtful. The case of *Halstead v. Black*, first cited, is an adjudication precisely in point, which does not appear to have been questioned or overruled, and until it is so, it is fair to assume that the law is correctly stated in it, and that this section does permit foreign judgments to be pleaded in the way directed by it. In pleading, under this section, the officer by whom the judgment was rendered must be designated. (*Carter v. Koesley*, 9 Bosw. 583). The precise language of the section must be followed; it is not sufficient to allege that the officer had full jurisdiction over both person and subject matter and "that judgment was entered." (*Hunt v. Dutcher*, 13 How. Pr. 538).

Subdivision 4.—CONDITIONS PRECEDENT.

In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state, generally that he, or the person whom he represents, duly performed all the conditions on his part. If that allegation is controverted, he must, on the trial, establish performance. (Co. Civ. Proc. § 533). Compliance with this section is optional. (*Mayor etc. v. Doody*, 4 Abb. Pr. 127). This section does not apply solely to a contract in which the conditions precedent are expressly stated, but to all contracts where such conditions are implied by law. (*Adams v. Sherrill*, 14 How. Pr. 297; *Chem. Nat. Bk. v. Carpentier*, 9 Abb. N. C. 301; *Youngs v. Perry*, 42 App. Div. 247). In pleading under this section, a strict compliance with its requirements is insisted upon, and the use of the word "duly" is advisable. (*Hunt v. Dutcher*, 13 How. Pr. 538). But it is not necessary to follow literally the language of the statute. An allegation that the conditions were fully and faithfully performed is sufficient. (*Rowland v. Phalen*, 1 Bosw. 44). If a party intends to rely upon an excuse for non-performance of the conditions, he must set out the excuse, and he cannot prove it under an allegation of performance, under this

section (*Oakley v. Morton*, 11 N. Y. 25; *Fox v. Davidson*, 36 App. Div. 159).

Subdivision 5.—INSTRUMENTS FOR THE PAYMENT OF MONEY ONLY.

Where a cause of action, defense, or counter-claim, is founded upon an instrument for the payment of money only, the party may set forth a copy of the instrument, and state that there is due to him thereon, from the adverse party, a specified sum, which he claims. Such an allegation is equivalent to setting forth the instrument according to its legal effect. (Co. Civ. Proc. § 534). This section applies only to an instrument which is upon its face a complete, valid and binding obligation. Where it is upon its face, incomplete and invalid, and facts, not stated in it, need to appear to show its validity, this section does not apply. (*Broome v. Taylor*, 76 N. Y. 564; *Tooker v. Arnoux*, Id. 397). It is not necessary that an instrument should contain an express promise to pay, to enable a party to plead upon it under this section. If the instrument is such that the law would imply a promise to pay, it is sufficient. (*Burke v. Ashley*, 12 Hun, 637). The section has been held to apply to promissory notes (*Keteltas v. Myers*, 19 N. Y. 231), although payable by installments and expressing consideration (*Chase v. Behrman*, 10 Daly, 344); and a bill of exchange accepted by a corporation (*Andrews v. Astor Bk.* 2 Duer. 629); and a bond for the payment of money (*Broome v. Taylor*, 76 N. Y. 564); also to a policy of insurance (*Sullivan v. Spring Garden Ins. Co.*, 34 App. Div. 128); but not to a mortgage (*Rose v. Meyer*, 7 Civ. Proc. Rep. 219); nor to a check in an action against the drawer (*Judd v. Smith*, 3 Hun, 190); nor to an action against the indorser of a promissory note. (*Conkling v. Gandall*, 1 Abb. Ct. of App. 423; 1 Keyes, 228). An instrument in a foreign language may be pleaded upon under this section. (*Nourny v. Dubosty*, 12 Abb. Pr. 128). In an action by the payee of a note, against the maker, a complaint, setting forth a copy of the note, and that there is due from defendant to plaintiff a certain sum is good.

(*Butchers & Drovers' Bank v. Jacobson*, 15 Abb. Pr. 218). It is not necessary to aver that the defendants made the note, or the execution or delivery to the plaintiff (Id.; *Marshall v. Rockwood*, 12 How. Pr. 452); or that the plaintiff was the owner of the note (*Keteltas v. Myers*, 19 N. Y. 231); but the complaint must show the connection between the plaintiff and the instrument sued on, or that it was indorsed and transferred to him, or that he is the owner and holder of it. (*Lord v. Cheseborough*, 4 Sandf. 696). If the instrument is by its terms payable to a third party, a complaint is good which avers that the plaintiff became the owner by purchase. (*Prindle v. Caruthers*, 15 N. Y. 425).

Subdivision 6.—SLANDER AND LIBEL.

It is not necessary, in an action for libel or slander, to state in the complaint any extrinsic fact, for the purpose of showing the application to the plaintiff, of the defamatory matter; but the plaintiff may state, generally, that it was published or spoken concerning him; and, if that allegation is controverted, the plaintiff must establish it on the trial. (Co. Civ. Proc. § 535). This section is limited to cases in which proof of extrinsic facts is necessary, for the application of the words, and not where such proof is necessary to determine their meaning. Hence, where the meaning of the words is so ambiguous, that extrinsic facts are necessary to be proved, to show them to be actionable at all, the necessity of stating these facts by an explicit averment is precisely the same as it always was. (*Fry v. Bennett*, 5 Sandf. 66; *Wallace v. Bennett*, 1 Abb. N. C. 478). An averment under this section of the code, that the words were spoken of and concerning the plaintiff, is not sufficient, where it is contradicted by other allegations, in the complaint. (*Fleischmann v. Bennett*, 87 N. Y. 231).

ARTICLE II.

FORMAL RULES CONCERNING PLEADINGS.

SECTION.

1. How to be written and indorsed.
2. Statement of facts.
3. Subscription.
4. Service and filing.
 - Subd. 1.—Service generally.
 - Subd. 2.—Service on co-defendant.

Sec. 1. How to Be Written and Indorsed.

Every pleading must be in the English language, made out upon paper or parchment, in a fair legible character, in words at length and not abbreviated. But the proper and known names of process, and technical words, may be expressed in appropriate language, as now is and heretofore has been customary; such abbreviations as are now commonly employed in the English language may be used; and numbers may be expressed by Arabic figures, or Roman numerals, in the customary manner. (Co. Civ. Proc. § 22). All pleadings must be fairly and legibly written or printed. Every pleading, exceeding two folios in length, must be distinctly numbered and marked at each folio, in the margin thereof, and all copies of a pleading, either for the parties or the court, shall be numbered or marked in the margin so as to conform to the original draft, and shall be indorsed with the title of the cause. If not so written and folioed and indorsed as aforesaid, the clerk shall not file the same, nor will the court hear any motion or application founded thereon. (General Rule 19). If these requirements are not complied with, the remedy is to return the paper, with the statement upon it of the objection to it, and the objection is waived unless such return is made within twenty-four hours. (Id.).

Sec. 2. Statement of Facts.

The facts in a pleading should be simply and plainly stated. Each cause of action (Co. Civ. Proc. § 483), or defense, or counter-claim (Id. § 507), must be separately

stated and numbered. If the pleading is properly drawn, the commencement of each cause of action or defense should be distinguished by the phrase, "and for a further cause of action," or "for a further defense" (*Benedict v. Seymour*, 6 How. Pr. 298); but if each one is stated in a paragraph separately numbered, it is good. (*Parsons v. Hayes*, 4 Law. Bull. 31; *Waite v. Saybel*, 44 App. Div. 634). Each cause of action and defense should be complete in itself, without reference to any other (*Xenia Branch Bank v. Lee*, 2 Bosw. 694; *Spencer v. Babcock*, 22 Barb. 326). A defect in a statement of one cause of action or defense is not aided by the same statement contained in another one, unless the one refers in terms to the other. (*Sinclair v. Fitch*, 3 E. D. Smith, 677; *Ayres v. Covill*, 18 Barb. 260). To avoid unnecessary repetition, the pleader may refer in one cause of action or defense, to the allegations which have been previously set out in another one (*Cragin v. Lovell*, 88 N. Y. 258); but the reference must be clearly made, and the allegations sought to be incorporated in the subsequent cause of action, must be referred to and made a part of it. (*Reiners v. Brandhorst*, 59 How. Pr. 91; *Anderson v. Speers*, 8 Abb. N. C. 382, 455). A failure to state the causes of action or defenses separately is not a ground for demurrer (*Freer v. Denton*, 61 N. Y. 492); but advantage must be taken of it by motion. (*Coml. Bank v. Pfeiffer*, 22 Hun, 327; *Gunn v. Fellows*, 41 Hun, 257). The code does not permit the same cause of action or defense to be stated in different ways in different counts of the pleading (*Roberts v. Leslie*, 46 Super. 76); and where this is done, the pleader will be required to elect before the trial, upon which of them he will rely (*Waller v. Lyon*, 17 Wk. Dig. 305); but where it can be seen that the statement in several ways, is probably needful to prevent the failure of justice, in consequence of a variance between the pleading and the proof, such a statement is not regarded as unnecessary repetition within the meaning of the code, and it will be permitted. (*Blank v. Hartshorn*, 37 Hun, 101). Inconsistent defenses may be set up as separate defenses. (*Wendling v. Pierce*, 27 App. Div. 517).

Sec. 3. Subscription.

The pleading must be subscribed by the attorney. (Co. Civ. Proc. § 520). If the defendant appear in person, his signature to the verification is a sufficient subscription to the pleading. (*Hubbell v. Livingston*, 1 Co. Rep. 63). In cases where an infant sues or defends by a guardian *ad litem*, the attorney for the guardian may be subscribe the pleading. (*Hill v. Thacter*, 3 How. Pr. 407). If a pleading is not properly subscribed, it must be returned with notice of the defect, or the defect will be waived. (*Ehle v. Haller*, 6 Bosw. 661). The practice does not require the pleading to be dated, but it will be found quite convenient to do so.

Sec. 4. Service and Filing.

Subdivision 1.—SERVICE GENERALLY.

A copy of each pleading subsequent to the complaint, must be served on the attorney for the adverse party, within twenty days after the service of the preceding pleading. (Co. Civ. Proc. § 520). Where a pleading is served by mail, the opposite party has double time in which to serve the subsequent pleading. (Co. Civ. Proc. § 798). Letter press copies are not permitted to be served. (General Rule 19). It is very necessary that the copy served should be a correct copy of the original, for a party has a right to presume that it is correct, and may rely on such being the case. (*Littlejohn v. Munn*, 3 Paige, 280). The issues to be tried are only those raised by the copy, and if there is a variance, the copy served controls. (*Trowbridge v. Didier*, 4 Duer, 448). Service of the pleading, after the expiration of the time, is irregular, although before judgment has been entered. (*Mandeville v. Winne*, 5 How. Pr. 461; *Baker v. Curtiss*, 7 How. Pr. 478). Where the action is against two jointly, and the joint answer of one was served after the time to answer had expired, and was returned, and judgment was entered for the default of an answer, it was held to be regular. (*Jacques v. Greenwood*, 1 Abb. Pr. 230). As to the extension of the time to serve a pleading, see

Chap. VIII, Art. III, Sec. 3, and as to the manner of service, see Chap. VIII, Art. II, Sec. 2, *ante*.

Subdivision 2.—SERVICE ON CO-DEFENDANT.

Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant, who requires such a determination, must demand it in his answer, and must, at least twenty days before the trial, serve a copy of his answer upon the attorney for each of the defendants to be affected by the determination, and personally, or as the court or judge may direct, upon defendants so to be affected, who have not duly appeared therein by attorney. The controversy between the defendants shall not delay a judgment to which the plaintiff is entitled, unless the court otherwise directs. (Co. Civ. Proc. § 521). This section confers no new power on the court, but it is simply a regulation of practice. (*Albany City Savings Bank v. Burdick*, 87 N. Y. 40). It is not limited to actions of a purely equitable character. (*Derham v. Lee*, 47 Super. 174; *affd.* 87 N. Y. 599). The section only applies where the controversy between the co-defendants, and the rights to be settled between them, arise out of the subject matter of an allegation, as stated in the complaint, and are a part of the adjustment of that allegation, and it does not permit a new and distinct cause of action, not connected with that allegation, to be brought into the case. (*Lansing v. Hadsall*, 26 Hun, 619; *Rafferty v. Williams*, 34 Hun, 544; *Bliss v. Winters*, 40 App. Div. 622; *N. Y. Life Ins. & Tr. Co. v. Cuthbert*, 87 Hun 339; *affd.* without op. 148 N. Y. 742). Where the relief demanded in an answer is substantially the same as that sought in the complaint, the answer need not be served on the co-defendant (*Edwards v. Downs*, 13 Wk. Dig. 57); nor where the defendant asks only that the plaintiff's lien be declared to be subsequent to his. (*Bullymore v. Seward*, 15 Wk. Dig. 283). A failure to serve the answer on the co-defendant, will be disregarded upon appeal, if the controversy was tried, without objection. (*Syracuse Savings Bank v. Porter*, 36 Hun, 168). No reply is neces-

sary on the part of the co-defendant so served with a copy of an answer; it will be deemed controverted under section 522 of the code of civil procedure. (*Havana City Rwy. Co. v. Ceballos*, 49 App. Div. 421).

ARTICLE III.

VERIFICATION OF PLEADINGS.

SECTION.

1. When required.
2. When omitted.
3. By whom made.
 - Subd. 1.—By a party.
 - Subd. 2.—Where party is a domestic corporation.
 - Subd. 3.—Where the people or a public officer are a party.
 - Subd. 4.—When verification may be made by agent or attorney.
4. Form of verification.
5. Remedy for defective verification.

Sec. 1. When Required.

Where a pleading is verified, each subsequent pleading, except a demurrer or the general answer of an infant by his guardian *ad litem*, must also be verified. (Co. Civ. Proc. § 523). A subsequent pleading is one which is subsequent in order, to the pleading which is verified, or which is made in answer to it; the term does not mean a pleading later in time only; although the answer may be verified, the plaintiff may serve an amended complaint which is unverified. (*Hempstead v. Hempstead*, 7 How. Pr. 8). If the action is brought against three, and a verified complaint is served on two, and an unverified complaint on one of the defendants, the defendants cannot serve an unverified joint answer, but the two on whom the verified complaint is served, must verify their answer. (*Wendt v. Peyser*, 14 Hun, 114). In an action against co-partners, an answer which denied knowledge or information of some material allegations, was verified by one of the defendants only, and it was held that the answer was good only as to that defendant. (*Lacy v. Wilkinson*, 7 Civ. Proc. Rep. 104). As a general rule, the

complaint need not be verified, except in an action brought under section 1937 of the code of civil procedure, for the purpose of charging defendants not personally summoned. (Co. Civ. Proc. § 1938). Any defense, however, which does not involve the merits of the action, shall not be pleaded, unless it is verified as prescribed in this article. (Co. Civ. Proc. § 513). The certificate of a notary public of the state, under his hand and seal of office, of the presentment by him, for acceptance or payment, or of the protest, for non-acceptance or non-payment, of a promissory note or bill of exchange, or of the service of notice thereof on a party to the note or bill; specifying the mode of giving the notice, the reputed place of residence of the party to whom it was given, and the postoffice nearest thereto; is presumptive evidence of the facts certified, unless the party against whom it is offered, has served upon the adverse party, with his pleading, or within ten days after joinder of an issue of fact, an original affidavit to the effect, that he has not received notice of non-acceptance, or of nonpayment of the note or bill. A verified answer is not sufficient as an affidavit, within the meaning of this section. (Co. Civ. Proc. § 923). The affidavit required by this section is not sufficient, if made on information and belief, but it must be made of the positive knowledge of the defendant. (*Gowtry v. Doane*, 51 N. Y. 84). The notary's certificate is only presumptive evidence, however, and the defendant may show that the notice was never received, although no affidavit under this section is served. (*Townsend v. Auld*, 10 Misc. 343). In an action brought by or against a corporation, the plaintiff is not required upon the trial, to prove the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff or defendant, as the case may be, is not a corporation. (Co. Civ. Proc. § 1776). A denial in an answer of the allegation contained in the complaint as to incorporation is not sufficient; there must be an affirmative allegation that the plaintiff or defendant is not a corporation. (*Nickerson v. Canton Marble Co.*, 35 App. Div. 111; *Lamson Store Service Co. v. Conyngham*, 10 Misc. 428). Where the complaint

is not verified, and the answer sets up a counter-claim, and also a defense by way of denial or avoidance, the affidavit of verification may be made to refer exclusively to the counter-claim. In a case prescribed in this section the requirements of sections 524, 525 and 526 are applicable to the verification and counter-claim, as if the latter was a separate pleading. (Co. Civ. Proc. § 527).

Sec. 2. When Omitted.

The verification may be omitted, in a case where it is not otherwise specially prescribed by law, where the party pleading would be privileged from testifying as a witness, concerning an allegation or denial contained in the pleading. (Co. Civ. Proc. § 523). A defendant is not excused from verifying his answer to a complaint, charging him with having confessed or suffered a judgment, or executed a conveyance, assignment, or other instrument, or transferred or delivered money, or personal property, with intent to hinder, delay, or defraud his creditors; or with being a party or privy to such a transaction by another person, with like intent towards the creditors of that person; or with any fraud whatever, affecting a right or the property of another. (Co. Civ. Proc. § 529). These sections apply only to a case, where the allegations which come within the privilege, are contained in a pleading to be answered. They do not extend to cases where new matter of avoidance, or a counter-claim is set up, containing allegations as to which the pleader would be excused from testifying. (*Fredericks v. Taylor*, 52 N. Y. 596). Where a party claims the right to serve an unverified answer in an action for criminal conversation against him, he should either serve with his answer, or present upon a motion made to set aside the answer, an affidavit, showing that the answer would tend to disgrace him; without such an affidavit the court cannot assume that the answer would have any such tendency. (*Roache v. Kivlin*, 25 Hun, 150). But if the complaint charged the defendant with an act, which if true would subject him to be punished as for a crime, he may serve an unverified answer without such an affidavit. (*Anderson v. Doty*, 33 Hun, 238). In other

words, where the complaint does not show on its face that the defendant would be privileged, the affidavit must be served. (*Dehn v. Manderille*, 68 Hun, 335). When a party is excused from verifying a pleading, he need not verify any of the allegations in the pleading. (*Wheeler v. Dixon*, 14 How. Pr. 151; *Blaisdell v. Raymond*, 6 Abb. Pr. 148). In an action brought by a creditor of a manufacturing corporation, against the trustees, to enforce a liability incurred by reason of a failure to file the annual report, the defendant is entitled to serve an unverified answer. (*Gadsden v. Woodward*, 103 N. Y. 242). A husband sued for divorce on the ground of adultery, need not verify his answer. (Co.Civ.Proc. § 1757). Nor need the defendant in an action for libel serve a verified answer (*Wilson v. Bennett*, 2 Civ. Proc. Rep. 34); and no affidavit is necessary. (*Goff v. Star Printing Co.*, 21 Abb. N. C. 211). In an action for money received contrary to the statute of betting and gaming, in which the plaintiff does not show whether the defendant received the money as a stakeholder, or winner, the defendant was not permitted to serve an unverified answer, unless he made it appear that he received the money as winner. (*Lynch v. Todd*, 13 How. Pr. 546). So, in an action for negligence for wrongfully and immoderately driving upon the public highway while the defendant was intoxicated, the answer need not be verified and no affidavit is necessary. (*Rutherford v. Krause*, 8 Misc. 547). To avail himself of the privilege, the defendant must deny the allegations in the complaint and omit the verification; a statement in his answer that he declines to answer such allegations, because to do so might subject himself to criminal prosecution, is an admission of the allegations. (*Scovill v. New*, 12 How. Pr. 319). Leave of the court to serve an unverified pleading is not required. (*Moloney v. Dows*, 2 Hilt. 247). Where the right to serve an unverified pleading is disputed, it should be decided either by a motion to strike it out, or to compel its acceptance, if it has been returned (*Fredericks v. Taylor*, 52 N. Y. 596); or for judgment upon it because the pleading is not verified. (*Moloney v. Dows*, 2 Hilt. 247). Section 529 is not limited to fraudulent transfers of property, but covers

an action for deceit for false representations in the sale of stock. (*Beckley v. Chamberlin*, 65 Hun, 37).

Sec. 3. By Whom Made.

Subdivision 1.—BY A PARTY.

The verification must be made by the affidavit of the party, or if there are two or more parties united in interest, and pleading together, by at least one of them, who is acquainted with the facts, except as otherwise required in this section. (Co. Civ. Proc. § 525). One for whom the action is prosecuted or defended, although not a party to the record, may verify the pleading under this section. (*Tabor v. Gardner*, 6 Abb. Pr. N. S. 147; appeal dismissed, 41 N. Y. 232). A guardian *ad litem* may verify as a party, but not as agent or attorney (*Clay v. Baker*, 41 Hun, 58); but he cannot do so until he has been actually appointed. (*Hill v. Thacter*, 3 How. Pr. 407). If the defendants are united in interest, any one of them can verify a joint pleading (*Zoellner v. Newberger*, 1 Law Bull. 29; *Paddock v. Palmer*, 32 Misc. 427), but if the interests of the parties are several, each must verify the pleading. (*Gray v. Kendall*, 5 Bosw. 666; *Wendt v. Peyser*, 14 Hun, 115); it has been held, accordingly, that in an action against the maker and indorser of a note the defendants are not so united in interest that one can verify for both (*Hull v. Ball*, 14 How. Pr. 305); the same ruling has been made in an action against a husband and wife, to set aside a fraudulent conveyance to the wife (*Youngs v. Seeley*, 12 How. Pr. 395); but in an action against the husband and wife, claiming damages against them jointly, the husband may verify the answer alone, although the contract was made in regard to the joint property of the wife. (*Hartley v. James*, 18 Abb. Pr. 299).

Subdivision 2.—WHERE PARTY IS A DOMESTIC CORPORATION.

Where the party is a domestic corporation, the verification must be made by an officer thereof. (Co. Civ. Proc. § 525, subd. 1). A verification by an officer of a domestic

corporation under this subdivision, is deemed a verification by the party, within the rule that it is not necessary to state the grounds of his belief, or the reason why the verification is made by him. (*Am. Insulator Co. v. B. & M. Telg. Co.*, 7 Civ. Proc. Rep. 443). A "trustee and director" of a corporation is an "officer" within the meaning of this section. (*Bigelow v. The Whitehall Mfg. Co.*, 1 City Ct. Rep. 138). A "general manager" is not such an "officer." (*Meton & Sons, Ltd. v. Isham Wagon Co.*, 15 Civ. Proc. Rep. 259). An ex-president cannot verify under this section, even though all the officers have resigned and none have been elected in their places. (*Kelly v. The Woman Publishing Co.*, 15 Civ. Proc. Rep. 259). An attorney who swears that 'he is the duly authorized attorney and agent appointed by a corporation to verify petitions and pleadings in behalf of the corporation for the institution of condemnation proceedings, and is the agent of the corporation for the purpose of acquiring real estate' is an "officer" within section 525. (*Matter of St. L. & A. R. R. Co.*, 133 N. Y. 270, 278).

Subdivision 3.—WHEN THE PEOPLE OR A PUBLIC OFFICER ARE A PARTY.

When the people of the state are, or a public officer, in their behalf, is the party, the verification may be made by any person acquainted with the facts. (Co. Civ. Proc. § 525, subdv. 2).

Subdivision 4.—WHEN VERIFICATION MAY BE MADE BY AGENT OR ATTORNEY.

Where the party is a foreign corporation; or where the party is not within the county where the attorney resides, or if the latter is not a resident of the state, the county where he has his office, and capable of making the affidavit; or if there are two or more parties united in interest, and pleading together, where neither of them, acquainted with the facts, is within that county, and capable of making the affidavit; or where the action or defense is founded upon a written instrument for the

payment of money only, which is in the possession of the agent or the attorney; or where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney; in either case, the verification may be made by the agent of, or the attorney for the party. (Co. Civ. Proc. § 525, subd. 3). In an action upon an account, the bill of items furnished under section five hundred and thirty-one, may be verified by the agent or attorney, if the facts are within his personal knowledge, or if the party is not within the county where the attorney resides, or capable of making the affidavit. (Co. Civ. Proc. § 531). If a party is absent from the county, the verification may in all cases, be made by the agent or attorney, although it is made upon information and belief, and although it allege that the party have no knowledge or information sufficient to form a belief. (*Neuberger v. Webb*, 24 Hun, 347). It must be borne in mind, however, that the pleading cannot deny information of some fact which must be within the party's knowledge, even though verified properly by the attorney. (*Pardi v. Conde*, 27 Misc. 496). The agent or attorney may verify the complaint, in an action on a written instrument for the payment of money only, which is in his possession, whether his client is in the county or not. (*Myers v. Gerrits*, 13 Abb. Pr. 106). A mortgage is not such an instrument. (*Peyser v. McCormack*, 7 Hun, 300). The attorney may verify the complaint for a non-resident client, although the client has another agent in the county, from whom the attorney derives his information. (*Dracert v. Appsert*, 2 Abb. Pr. 165). But the mere fact that one is the agent for another, will not qualify him to verify all pleadings for his principal. The character of an agency, that will qualify one to verify a pleading in an action, not founded upon an instrument for the payment of money, must be such as would ordinarily bring all the material allegations of the pleading within his personal knowledge, and he must have acted as substitute for his principal, in the transactions in question, and have derived his knowledge of the truth of the allegations of the pleading, by having been a party in effect to the matters in controversy.

(*Boston Loco. Works v. Wright*, 15 How. Pr. 253). The fact that the attorney cannot find his client within the city where he lives, will not authorize him to make the verification. (*Lyons v. Murat*, 54 How. Pr. 23). Where the verification is made by the attorney, the court should see to it that the attorney has sought his information in the proper quarter, and that information should come either from the party, or from some one who has personal knowledge of the facts. (*Stedeker v. Taft*, 4 Law Bull. 88). If the verification of an answer by the attorney is inconsistent with the allegations of the pleading, the court may in its discretion, require the party to verify the pleading. (*Jaillard v. Tomes*, 3 Abb. N. C. 24). A managing agent of a foreign corporation, having charge of its business, and on whom the process was served, may verify the pleading, without stating the grounds of his belief. (*Glaubenskle v. The H. & A. Packet Co.*, 9 Abb. Pr. 104). Where all the officers of a domestic corporation are absent from the county where the attorney resides he may verify the complaint in an action brought by the corporation. (*High Rock Knitting Co. v. Bronner*, 18 Misc. 627; *affd.* without opinion, 29 App. Div. 627; *The Climax Specialty Co. v. Smith*, 31 Misc. 275).

Sec. 4. Form of Verification.

The affidavit of verification must be to the effect, that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. Where it is made by a person other than the party, he must set forth, in the affidavit, the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why it is not made by the party. (Co. Civ. Proc. § 526). This section must be read in connection with section five hundred and twenty-four which prescribes that the allegations or denials in a pleading must in form, be stated to be made by the party pleading; and that unless they are stated in the pleading to be made upon the information and belief of the party, they must be regarded, for all purposes, as

having been made upon the personal knowledge of the party verifying the pleading, and that an allegation that the party has not sufficient knowledge or information to form a belief, with respect to a matter, must, for the same purpose, be regarded as an allegation that the person verifying the pleading has not such knowledge or information. It is not necessary that the form of verification given in section five hundred and twenty-six should be literally followed; a substantial compliance with it is all that is absolutely essential. (*Waggoner v. Brown*, 8 How. Pr. 212). It must, however, be stated that the verification is true "to the knowledge" of the affiant, and the omission of those words is fatal. (*Sexauer v. Bowen*, 10 Abb. Pr. N. S. 335). An allegation that the affiant knows the contents of a paper, and that the same are true, is equivalent to saying that they are true to his knowledge. (*Matter of Macaulay*, 94 N. Y. 574). If all the facts in a pleading are stated positively and upon the knowledge of the party, it is not necessary to add the words "except as therein stated to be alleged upon information and belief." (*Ross v. Longmuir*, 15 Abb. Pr. 326). If all the allegations of the pleading are stated to be made upon information and belief, a verification is sufficient, which states that the pleading is true, as the affiant is informed and believes (*Orvis v. Goldschmidt*, 2 Civ. Proc. Rep. 314); or that the material facts are true as he believes. (*Radway v. Mather*, 5 Sandf. 654). The following forms have been held to be insufficient. "The above complaint is true of his own knowledge" (*Waggoner v. Brown*, 8 How. Pr. 212); "that the party has read the pleading, and that the same is true to the best of his knowledge and belief" (*Van Horne v. Montgomery*, 5 How. Pr. 238); that the pleading "is true except as to the matters therein stated upon information and belief," etc. (*Sexauer v. Bowen*, 10 Abb. Pr. N. S. 335). A verification which substituted the word "facts" for the word "matters" was held to be good (*Whelpley v. Van Epps*, 9 Paige, 332); so also was one which stated that the affiant "believes it to be true;" all the allegations there being made on information and belief. (*Duffy v. Brady*, 4 Abb. Pr. 432). If the verifi-

cation is made by the agent or attorney, an omission to state the reasons why it is made by him, is fatal, and the party may treat the pleading as unverified. (*Fitch v. Bigelow*, 5 How. Pr. 237). So also, an omission to state the grounds of the belief of the attorney or agent, making the verification, is fatal. (*Treadwell v. Fassett*, 10 How. Pr. 184; *Robinson v. Ecuador Development Co.*, 32 Misc. 106). Where the denial was on information and belief, a verification by the attorney, who gave as a reason that the defendant was out of the county, and as grounds of his belief, statements made to him by his client, was held sufficient to raise an issue (*Neuberger v. Webb*, 24 Hun, 347); but in a case in the court of common pleas, where the allegation in the answer was that the defendant had no knowledge or information sufficient to form a belief, and the answer was verified by the attorney, the court held that such verification was not good, saying that the attorney could not verify a pleading from a conversation which he had with one of the defendants, that they had no knowledge or information sufficient to form a belief as to the allegations which were thus denied. (*Stedeker v. Bernard*, 12 Daly, 212; see also *Pardi v. Conde*, 27 Misc. 496). If the action is upon an instrument for the payment of money only, which is in the possession of the attorney, a statement of that fact is a sufficient reason for his making the verification (*Matthews v. Smith*, 9 Civ. Proc. Rep. 165), and it is also a sufficient statement of the grounds of his belief. (*Hyde v. Salg*, 27 Hun, 369). A pleading, in which nothing is stated on information and belief, verified by an agent or attorney, who after the formal prescribed affidavit of verification states the sources of his information and the grounds of his belief was held good in *Beyer v. Wilson* (46 Hun, 397), and bad in *Moran v. Helf* (52 App. Div. 481). The latter rule seems more consonant with reason and good sense. In such an action, the attorney for the plaintiff may properly verify the reply, but he should state, in verifying that pleading, the grounds of his belief, and the reasons why the verification is not made by the plaintiff, which statement, it seems, should be something different from the mere fact that the action is upon an instrument

for the payment of money only. (*Kirkland v. Aiken*, 66 Barb. 211). The verification must be subscribed by the person making it, and must be sworn to, before some person authorized to take affidavits. It may be sworn to before the clerk or law partner of the attorney for a party, or before his counsel, but if it is sworn to before his attorney of record, the verification is irregular. (*Gilmore v. Hempstead*, 4 How. Pr. 153). Where a pleading is sworn to without the state, and the verification was not certified in the manner required to entitle a deed to be recorded in this state, it was treated as unverified. (*Phelps v. Phelps*, 6 Civ. Proc. Rep. 117).

Sec. 5. Remedy for Defective Verification.

The remedy for a defective verification of a pleading, is to treat the same as an unverified pleading. Where the copy of a pleading is served without a copy of a sufficient verification, in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice with due diligence, to the attorney of the adverse party, that he elects so to do. (Co. Civ. Proc. § 528). A delay in taking advantage of a defective verification is a waiver of the right to object to it. (*Wilson v. Bennett*, 2 Civ. Proc. Rep. 34). The objection that the pleading is not properly verified cannot be taken at the trial. (*Schwarz v. Oppold*, 74 N. Y. 307). The precise defect in a verification should be pointed out when it is returned; it is not sufficient to say simply, that the pleading is not properly verified. (*Snape v. Gilbert*; 13 Hun, 494). If the verification of the complaint is defective, the party may treat it as unverified, and need not verify his answer. (*Quinn v. Tilton*, 2 Duer, 648; *Treadwell v. Fassett*, 10 How. Pr. 184). Where several defendants, not united in interest, join in an answer, and one only verifies it, the pleading is good as to him, and it cannot be returned; and the remedy of the plaintiff is to give prompt notice that the plaintiff requires an answer verified by all the defendants. (*Hull v. Ball*, 14 How. Pr. 305). If the objection to the verification is not apparent upon its face; as for instance, it is made before an officer who is disqualified;

the defect can only be taken advantage of by a motion to set aside the pleading, because it is not properly verified. (*Gilmore v. Hempstead*, 4 How. Pr. 153). Where any pleading subsequent to the complaint is not properly verified, the party may move for judgment on account of the defective verification, or he may present the question for determination by a motion to strike out the pleading, in case it has been served, or to compel its acceptance, in case of a refusal to receive it. (*Fredericks v. Taylor*, 52 N. Y. 596). These decisions were made under the code of procedure, but no reason is seen why they are not applicable under section five hundred and twenty-eight. Although the pleading is not properly verified, or the verification is defective, a motion to compel a party to verify the pleading will be denied. (*Ralph v. Husson*, 51 Super. 515).

ARTICLE IV.

CONSTRUCTION OF PLEADINGS.

SECTION.

1. Rules of construction.
2. What deemed admitted.

Sec. 1. Rules of Construction.

The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties. (Co. Civ. Proc. § 519). It was formerly the settled rule, to construe doubtful pleadings most strongly against the pleader, but this rule has been so far modified by the code, as now to require them to be liberally construed, with a view to substantial justice between the parties. This modification has, however, been held to extend only to matters of form, and not to apply to the fundamental requisites of a cause of action. The construction of doubtful or uncertain allegations in a pleading, which enables a party by thus pleading, to throw upon his adversary the hazard of correctly interpreting their meaning, is no more allowable now, than formerly; and when a pleading is susceptible of two meanings, that shall be taken which is most unfavorable

to the pleader. (*Clark v. Dillon*, 97 N. Y. 370; *Farrell v. Amberg*, 8 Misc. 220; *affd.* without opinion, 151 N. Y. 670). As to matters of form, however, that construction is to be taken which is most favorable to the pleader. (*Prouty v. Whipple*, 10 Wk. Dig. 387). But in matters of substance, the law will not assume in favor of the pleader, any fact which he has not averred, nor will it accept as a fact, any conclusion of the pleader as to malice, fraud, or evil intent on the part of his adversary. (*Malone v. Sherman*, 49 Super. 530). If the pleader omits to allege a fact material to his cause of action or defense, the fact thus omitted is presumed not to exist. (*Cruger v. The Hudson River Railroad Co.*, 12 N. Y. 190, 201). The meaning of a pleading must be found within the pleading itself (*Weeks v. Ketchas*, 1 N. Y. St. Rep. 96), and it cannot be inferred from the intention of the pleader sought in facts outside of the paper. (*Gould v. Glass*, 19 Barb. 179). The court will construe a pleading so as to make it rational rather than an absurdity (*Olcott v. Carroll*, 39 N. Y. 436). A verified pleading must be construed if possible, so that all parts of it will harmonize. (*Ryle v. Harrington*, 4 Abb. Pr. 421). Any general statements in a pleading, which are intended to be qualified, must be taken with such qualification. (*Page v. Boyd*, 11 How. Pr. 415). Notwithstanding the rule laid down in section five hundred and nineteen, the judgment must still be *secundum allegata et probata*. (*Southwick v. First Nat'l Bk.*, 84 N. Y. 420). The party setting up a cause of action in tort, cannot at the trial, convert it into a cause of action on contract. (*New-decker v. Kohlberg*, 81 N. Y. 296). A more liberal rule of construction of the pleading is adopted upon the trial, than if the objection is taken by demurrer (*St. John v. Northrup*, 23 Barb. 25); or by motion. (*Wall v. Buffalo Water Works*, 18 N. Y. 119). Even on demurrer, a pleading will not be deemed insufficient, for the reason that the facts are imperfectly, or informally averred, or that the pleading lacks definiteness and precision, or that the material facts are only argumentatively alleged. The complaint is deemed to allege whatever can be implied from the allegations therein, by fair and reasonable in-

tendment, and facts impliedly averred, are traversable in the same manner as though directly alleged. (*Marie v. Garrison*, 83 N. Y. 14, 23). Upon the trial, averments which point out the nature of the pleader's claim, are sufficient if under them he could give evidence to support it. (*Berney v. Drexel*, 33 Hun, 34, 419; *Coatsworth v. Leigh Valley R. Co.*, 156 N. Y. 451). A liberal interpretation must always be given to the pleading, to sustain verdicts and judgments, when the parties have not been misled or injustice done. (*Graves v. Waite*, 59 N. Y. 156, 162). Where the same word, used in a pleading, has different meanings, one the result of judicial or statutory definition, and the other founded simply on an inaccurate popular use, the latter can only be adopted in construing a pleading, where it plainly appears from other averments, or the whole tenor of the pleading, that such was the sense in which it was employed. (*Cook v. Warren*, 88 N. Y. 37). A restricted meaning will never be given to words susceptible of a more liberal construction, unless the whole tenor of the pleading shows that the language was used in a restricted sense, when such restricted sense would exclude a defense on the merits. (*Clare v. The National City Bank*, 35 Super. 261). A clerical error in a pleading, which has not misled the opposite party, will always be disregarded. (*Roussel v. St. Nicholas Ins. Co.*, 41 Super. 279; *Traver v. Eighth Av. R. R. Co.*, 4 Abb. Ct. App. 422). If the allegations of the answer are vague and uncertain, and the plaintiff goes to trial without moving to make them more definite and certain, they will be taken most strongly against him. (*Wall v. Buffalo Water Works*, 18 N. Y. 119). If it is doubtful on the wording of an answer, whether it sets up a counter-claim or payment, it will be construed as alleging payment, and not as a counter-claim. (*Bates v. Rosekrans*, 23 How. Pr. 98). Conclusions of law will not be regarded. (Art. 1, Sec. 2, ante). If the place where a thing occurred is material, an ambiguous allegation regarding it, will be construed most strongly against the pleader. (*Beach v. Bay State Co.*, 30 Barb. 433). To determine whether the facts disclose a defense, the complaint and the answer will be construed together.

(*Munger v. Shannon*, 61 N. Y. 251). If the nature of the action is doubtful, the prayer for relief may be consulted to ascertain it. If the complaint states a cause of action for damages, and asks judgment for damages, the action is to be deemed legal, rather than equitable in its nature, although unnecessary allegations are inserted, and the prayer for damages is coupled with a prayer for alternative relief, to which the plaintiff is not entitled. (*Graves v. Spier*, 58 Barb. 349).

Sec. 2. What Deemed Admitted.

Each material allegation of the complaint, not controverted by the answer, and each material allegation of new matter in the answer, not controverted by the reply, where a reply is required, must for the purposes of the action, be taken as true. But an allegation of new matter in the answer to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party, by traverse or avoidance as the case requires. (Co. Civ. Proc. § 522). The failure to deny does not under this section, admit any allegations in a pleading, as to the meaning or contents of a paper, set out in it, or annexed to, or made a part of it (*Bonnell v. Griswold*, 68 N. Y. 294); nor any conclusions of law set forth in a pleading, except so far as they may be legitimate deduction from the facts (*Alamango v. Supervisors of Albany Co.*, 25 Hun, 551); nor the correctness of inferences drawn from the facts stated; but only the truth of such facts as are alleged in the pleading. (*Bogardus v. N. Y. Life Ins. Co.*, 101 N. Y. 328). It is only the material allegations of the pleading which are deemed to be admitted. (*Sands v. St. John*, 36 Barb. 628; *affd.* 29 How. 574). Every allegation is material, unless it may be struck out as surplusage, and whatever cannot be so struck out would be deemed admitted under this section, if it were not controverted. (*Mayor of Albany v. Cunliff*, 2 N. Y. 165, 170). Where there is no denial of the allegations of the complaint, but only allegations of new matter inconsistent with it, all the facts alleged in the complaint are deemed to be admitted. (*Fleischmann v. Stern*, 90 N. Y. 110, 114). In an action

of trespass, the complaint alleged the possession and ownership of the *locus in quo*; the answer was that defendant was the owner of lands adjoining lands of the plaintiff, and that he entered to remove obstructions unlawfully placed thereon, and concluded by denying the allegations of the complaint, except as heretofore answered. Under this pleading, it was held that the ownership and possession in the plaintiff, of the *locus in quo*, were admitted by the pleading. (*Potter v. Smith*, 70 N. Y. 299). If a pleading has been amended, it is deemed to be abandoned, and the admissions in it do not avail the other party. (*Brown v. Feeter*, 7 Wend. 301; *Fry v. Bennett*, 3 Bosw. 200; *Nat'l Pipe Bending Co. v. Fisher*, 87 Hun, 175). Whenever a defense is intended as a counter-claim, it should be explicitly stated in the answer, so as to advise the opposite party, and in the absence of such a statement, especially when the pleader defines and characterizes his answer as a defense, and it is uncertain whether a counter-claim is intended, he is not in a position to insist that he has set up a counter-claim, and that the plaintiff has admitted it by a failure to serve a reply. (*Equitable Life Ass. Soc. v. Cuyler*, 75 N. Y. 511, 514). Where an admission in a pleading is alone relied upon by the opposite party to establish a fact, any statement made, in connection with the admission, of another fact, which would nullify the effect of the admission, must also be taken as established, and the whole of the statement must be taken and construed together; but this rule does not prevent the party who claims the benefit of the admission, from disproving the fact so alleged in connection with it, and so far as it is disproved, it is of no avail. (*Gildersleeve v. Landon*, 73 N. Y. 609). Whatever is admitted by a pleading cannot be contradicted in a subsequent pleading, nor upon the trial, nor in a finding. (*Cleveland v. Hatch*, 25 Hun, 308; *Page v. Willet*, 38 N. Y. 28). A finding by a referee, of a fact, which contradicts the admissions in the pleading, will be set aside. (*Ballou v. Parsons*, 11 Hun, 602). This section applies to an answer served upon co-defendants under section 521. (*Havana City Ry. Co. v. Ceballos*, 49 App. Div. 421).

ARTICLE V.

COPY OF ACCOUNT.

It is not necessary for a party to set forth, in a pleading, the items of an account therein alleged; but in that case, he must deliver to the adverse party, within ten days after a written demand thereof, a copy of the account, which, if the pleading is verified, must be verified by his affidavit, to the effect, that he believes it to be true; or, if the facts are within the personal knowledge of the agent or attorney for the party, or the party is not within the county where the attorney resides, or capable of making the affidavit, by the affidavit of the agent or attorney. If he fails so to do, he is precluded from giving evidence of the account. (Co. Civ. Proc. § 531). It was held by the superior court, that this section applied only to actions brought upon accounts stated. (*Moore v. Belloni*, 42 Super. 184; *Johnson v. Mallory*, 2 Robt. 681). But in the later case of *Barkley v. Rens. & Saratoga R. R. Co.* (27 Hun, 515), the supreme court at general term held that the defendant was entitled to a copy of account in almost every claim on contract which consisted of several items; and that the term "account" as used in section five hundred and thirty-one includes nearly all such claims; and the case of *Johnson v. Mallory* above cited, was overruled. The case of *Barkley v. The Rens. & Saratoga R. R. Co.*, was an action to recover a balance due for a large quantity of wood delivered by the plaintiff to the defendant; and the court in that case, held that it was the duty of the plaintiff upon demand, to have served a copy of his account upon the defendants. Wherever an account is alleged in pleading without items, the party upon demand is entitled to a bill of items. (*Wells v. VanAken*, 39 Hun, 315). Upon a motion under section 531, for the items of an account, affidavits are not essential; the face of the pleadings may disclose the right of the moving party to the relief asked. (*Badger v. Gilroy*, 21 Misc. 466). It is to be noted that, when duly demanded, the copy of an account alleged in

a pleading is a matter of right, not of discretion (Id.). The party seeking it must demand a copy of the account, but an order for it is not necessary in the first instance. (*Dowdney v. Volkening*, 37 Super. 313). The copy of account should state each item, with its date, amount and general character. (*Kellogg v. Paine*, 8 How. Pr. 329). Where a bill of items was served, containing the items of services sued for, but not placing a value on any separate item, it was held not to be sufficient. (*Colwell v. Ludlam*, 1 Law Bull. 42). Where a bill of items of payments showed the payments to various persons, and the aggregate amount, but not the separate amount of each payment, it was held not to be sufficient; and it was held that the name of each payee and the sum paid to him should be stated. (*Chandler v. Stevens*, 2 Law Bull. 5). Where an action is upon an account, all the items of the account on each side, both debit and credit, should be given in the copy of the account. (*Candee v. Doying*, 5 Civ. Pro. Rep. 92; *Union Hardware Co. v. Flagler*, 8 N. Y. St. Rep. 894). If the account served is not sufficiently definite, the party must move for a further account (*McKinney v. McKinney*, 12 How. Pr. 22); which he may do at any time before trial, even after a reply has been served. (*Yates v. Bigelow*, 9 How. Pr. 186). An order for a further account should contain the points in respect to which the further specifications are required. (*Kellogg v. Paine*, 8 How. Pr. 329). The court may order a more particular statement, in the specification of any item of the account. (*Wells v. VanAken*, 39 Hun, 315). The case of *Hoff v. Pentz* (1 Abb. N. C. 228), so far as it holds to the contrary, is overruled.

The penalty for a failure to serve an account upon demand, is that the party shall be precluded from giving evidence of the account. (Co. Civ. Proc. § 531). The order that he should be so precluded should be obtained at special term on application preliminary to the trial. (*Gebhard v. Parker*, 120 N. Y. 33). The objection cannot be taken at the trial without such an order. (*Bartow v. Sidway*, 72 Hun, 435). A party will not be precluded

from giving evidence, unless there is a total failure to serve an account. (*Schulhoff v. Co-Operative Dress Assn.*, 3 Civ. Proc. Rep. 412).

ARTICLE VI.

BILL OF PARTICULARS.

SECTION.

1. In what cases granted.
2. Application for the order.
3. The order.
4. What the bill should contain.
5. A further bill.
6. Effect of the bill.
7. Penalty for disobedience.

Sec. 1. In what Cases Granted.

The court may, in any case, direct a bill of particulars of the claim of either party, to be delivered to the adverse party. (Co. Civ. Proc. § 531). The power of a court of original jurisdiction, under this section extends to all descriptions of actions, and it may be exercised as well in behalf of the plaintiff, as of the defendant, whenever justice demands that a party should be apprised of the matter for which he is to be put to trial, with more particularity, than is required by the rules of pleading. (*Dwight v. Germania Life Ins. Co.*, 84 N. Y. 493). A defendant may be required to serve a bill of particulars as to the matters set forth in his answer, which is effectual only as a defense, as well as matters set up as a counter-claim. (*Kelsey v. Sargent*, 100 N. Y. 602). It will not be granted, however, where the answer is practically a general denial, though affirmative in form. (*Goddard v. Medicine Co.*, 52 Hun, 85). Whether or not a bill of particulars shall be granted is always in the discretion of the court. (*Witkowski v. Paramore*, 93 N. Y. 467; *Badger v. Gilroy*, 21 Misc. 466). The action of the court cannot be reviewed in the court of appeals. (*Id.*; Co. Civ. Proc. § 190). A bill of particulars can only be obtained by order of the court. (*Powers v. Hughes*, 39 Super. 482.) Its office is to amplify the pleadings, so as to indicate specifically the claim set up,

and limit the generality of the pleading, and thus prevent surprise in the trial (*Higenbotam v. Green*, 25 Hun, 214; *Gee v. Chase Man. Co.*, 12 Hun, 630); or as is stated in another case, it is to give information of the specific proposition for which the pleader contends, in respect to any material issuable fact in the case. (*Ball v. Evening Post Pub. Co.*, 38 Hun, 11). The effect of it is to restrict the proof to the matters specified, and to limit the demand to those matters. (*Id.*; *Matthews v. Hubbard*, 47 N. Y. 428). It is not intended to disclose the evidence which is relied upon by the party. (*Ball v. Evening Post Pub. Co.*, 38 Hun, 11; *Van Olinda v. Hall*, 82 Hun, 357). Although a party has a remedy by a notion, to make the pleading definite and certain, he is not compelled to rely upon that, but may apply for a bill of particulars. (*Tilton v. Beecher*, 59 N. Y. 176, 183; *Ball v. Evening Post Pub. Co.*, 38 Hun, 11). It will not ordinarily be allowed, where the information asked for is particularly within the knowledge of the party asking for it. (*Fink v. Jetter*, 38 Hun, 163; *Wigand v. DeJonge*, 18 Hun, 405). Where, however, the pleading involves transactions of great number, the court may direct a bill of particulars to be delivered, even though the transactions are known to the party asking for it. (*Roberts v. Safety Buggy Co.*, 1 App. Div. 74; *Fruin-Bambrick Cons. Co. v. Marks*, 48 App. Div. 51). In actions on money demands consisting of various items, a bill of particulars of the dates and description of the transactions, out of which the indebtedness is claimed to have arisen, is granted almost as a matter of course. But it is an error to suppose that bills of particulars are confined to actions involving an account, or to actions, for the recovery of money demands arising upon contracts. They are appropriate in all descriptions of actions, where the circumstances are such that justice demands that a party should be apprised of the matter for which he should be put to trial, with greater particularity, than is required by the rules of pleading. (*Tilton v. Beecher*, 59 N. Y. 176, 183). In actions of tort, however, they are not usually necessary, because the nature of those actions requires, that the

allegations contained in the pleadings should give the party sufficient information of the facts, which he is required to meet. But, as we have seen, they will be ordered in such actions whenever necessary. A bill of particulars may be granted in an action of libel. (*Ball v. Evening Post Pub. Co.*, 38 Hun, 11; *Daniel v. Daniel*, 2 Civ. Proc. Rep. 238). A bill of particulars may be granted before answer only where it is necessary to enable the defendant to answer. (*Watertown Paper Co. v. West*, 3 App. Div. 451; *McClellan v. Duncombe*, 26 App. Div. 353). The court may allow a party to withdraw those allegations in a pleading as to which particulars are asked. (*Dyett v. Seymour*, 8 N. Y. St. 429; *Lambert v. Perry*, 15 N. Y. St. 964). It is unnecessary to cite the numerous cases, in which bills of particulars have been granted or refused; each case stands upon its own particular circumstances; but will be decided upon an application of the principles cited above.

Sec. 2. Application for the Order.

The application must be made by a motion to the court, on notice. (*Clegg v. American Newspaper Union*, 7 Abb. N. C. 59). It may be had by the defendant before appearance. (*Roosevelt v. Gardinier*, 2 Cow. 463). It was held before the code, that if the application was made by the defendant after issue joined, it was a suspicious circumstance, and the court would require an excuse for his delay (*Andrews v. Cleveland*, 3 Wend. 437); but under the code decisions it has become well settled that an order for a bill of particulars will be made as well after issue joined as before. Indeed, the motion is often considered premature if made before answer. (*Watertown Paper Co. v. West*, 3 App. Div. 451); and, it sometimes follows that a motion for a bill of particulars has been denied before issue joined, and granted thereafter. (*Govin v. Miranda*, 87 Hun, 227; *Bullock v. Bullock*, 85 Hun, 373). It is much easier to show certain information to be necessary in preparing for trial, than for answer. (*Justum v. Bricklayers' Union*, 78 Hun, 503). It has been intimated, however, that the ability of the party desiring the bill of

particulars to prepare a pleading would be considered as tending to show an ability to prepare for trial without such information. (*Hazard v. Birdsall*, 16 N. Y. Supp. 30). In *Winchell v. Martin*, 14 Wk. Dig. 458), the fact that the defendant had delayed to ask for a bill of particulars until the day set for trial, was not held a sufficient ground for refusing it, where the plaintiff had delayed so long in bringing his action to trial, that it was stale. And in the case of *Shaffer v. Holm* (28 Hun, 264), where the defendant demanded a bill of particulars soon after the action was brought, but did not move for it until a year afterwards, it was held that was not laches sufficient to deny the motion. The motion should be made on the affidavit of the party, showing that the specific information which he seeks is not known to him; and if the affidavit is made by the attorney or agent, the reason why it is not made by the party should be set forth. (*Gridley v. Gridley*, 7 Civ. Proc. Rep. 215); and an order based upon an affidavit made by the attorney giving no such reason cannot be sustained. (*Mayer v. Mayer*, 29 App. Div. 393). A sufficient reason for the making of the affidavit by the attorney, is not stated by alleging that the party is not a resident of, or within the county where the deponent attorney resides and has his office. (*Cohn v. Baldwin*, 74 Hun, 563; appeal dismissed, 141 N. Y. 563). The affidavit should state that the party is ignorant of the matters alleged in the pleading, as to which the bill of particulars is asked; and that the information he seeks is necessary to enable him to prepare for trial. (*Dwight v. Germania Ins. Co.*, 22 Hun, 167; *affd.* 84 N. Y. 493). In an action for a tort, the affidavit of the party seeking the bill of particulars, should aver that he was not guilty of the offense or offenses charged in the complaint, and that he has no knowledge or information of the particular fact or facts upon which the adverse party relies, to sustain the charges, or as to which his proof would be directed. (*Gridley v. Gridley*, 7 Civ. Pro. Rep. 215). It has been held that an affidavit of merits in the moving papers of a defendant shows such knowledge of a defense as to lead to the clear inference that no bill of particulars

is necessary to enable the defendant to plead. (*Wolff v. Kaufman*, 65 App. Div. 29). This rule must be qualified, it is assumed, to the extent that, where the defendant shows in his moving papers that he seeks to learn facts which may enable him to set up more than one defense, the affidavit of merits will not prevent his securing the necessary information; the defendant may have more than the one defense upon the merits to which he makes oath. An affidavit that "the party was ignorant of the particulars and facts which the defendants expect to prove, or that he had no knowledge or belief as to the persons, times, or places of the facts, by which the defendants propose to establish the material averments in the answer," is wholly insufficient to sustain an order granting a bill of particulars. (*Orvis v. Dana*, 1 Abb. N. C. 268).

Sec. 3. The Order.

It was the former practice to procure an ex-parte order, directing the party to furnish a bill of particulars of the nature specified in the order; or to show cause, at a time therein stated, why he should not do so. (*Brewster v. Sackett*, 1 Cow. 571). It is the practice now, however, to move upon notice; and the order, which can only be made by the court, is, if granted, made peremptory in the first instance. The order should direct a time when the bill of particulars is to be furnished; should specify the nature and character of the information to be given; and should direct what particulars are to be furnished, as to the date, time, or place, or such other information as may be necessary. It should require a sufficiently definite statement, to give the party the requisite information, to enable him to meet the charge which is alleged against him, and to insure him against surprise upon the trial. It should also require the bill of particulars to be verified whenever the pleadings are verified, unless the case is an exceptional one. (*Manning v. Benedict*, 31 App. Div. 51). In an action for conspiracy, an order which directed a statement of all matters relating to the conspiracy alleged in the complaint, was held to be too broad, and was reversed.

(*Hubbard v. Otis*, 17 Wk. Dig. 348). The penalty for disobedience may be inserted in the order. (*Dwight v. Germania Ins. Co.*, 84 N. Y. 493, 505).

Sec. 4. What the Bill Should Contain.

The bill of particulars is sufficient, if it apprises the party of the grounds of the claim, so that there can be no surprise upon the trial. (*Stovits v. Bank of Troy*, 21 Wend. 186). The bill need not specify the names of the parties to the action. (*Gay v. Cary*, 9 Cow. 44). In stating items, it should give their dates, stating the day, if known, and if not known, the date should be given as particularly as practicable. (*Humphrey v. Cottleyou*, 4 Cow. 54). The amount and general character of each item should also be stated. (*Kellogg v. Paine*, 8 How. Pr. 329). In an action by an attorney to recover compensation for professional services, a bill of particulars is sufficient, however, that states the items of service and a gross amount claimed. (*Donohoe v. Pomeroy*, 47 N. Y. St. Rep. 74). A bill of particulars, in an action for the death of the plaintiff's intestate, which states certain specifications of negligence and then alleges that the defendants were negligent in other respects, is insufficient (*Baker v. Sutton*, 86 Hun, 588). If an account has been delivered with the pleading, the bill may refer to it without restating it. (*Goodrich ads. James*, 1 Wend. 289). Where an action was brought to recover upon a promissory note, and also upon an account, and the note was set out in the pleading, it was held that it need not be stated in the bill of particulars. (*People ex rel. Waring v. Monroe Com. Pleas*, 4 Wend. 200). A party need only state the particulars in his own claim; he need not give any offsets or payments in the bill of particulars. (*Williams v. Shaw*, 4 Abb. Pr. 209; *Way Manfg. Co. v. Corn*, 5 Law Bull. 81). The bill of particulars should comply carefully with the requirements of the order, whatever they may be. Wherever a party cannot give the details required by the order, he should give them as nearly as possible, and state the reason why he is unable to give them more completely. (*Chandler v. Stevens*, 2 Law Bull. 5).

Sec. 5. A Further Bill.

If the first bill is not sufficient, or does not comply with the order, the court will order a further bill if necessary; and the order for a further bill of particulars should state the points in which the first was defective. (*Kellog v. Paine*, 8 How. Pr. 329). If the party has voluntarily furnished a bill of particulars, it is doubtful whether a further bill should be ordered. (*Langdon v. Brown*, 51 Super. 367). Whether or not a further bill will be ordered is, in every case, discretionary. (*Humphrey v. Cottleyou*, 4 Cow. 54). It will not be ordered, after the trial of an action is begun before a referee. (*Cadwell v. Goodenough*, 2 Robt. 706). The bill of particulars may be amended after the case is at issue (*Fuller v. Roosevelt*, 4 Cow. 144); or after a new trial has been ordered in the action (*Spawn v. Veeder*, 4 Cow. 503); or at the trial, if the other party is not surprised or prejudiced. (*Parsons v. Sutton*, 66 N. Y. 92). A referee may allow a bill of particulars, annexed to the pleading, to be amended at the trial. (*Williams v. Davis*, 7 Civ. Pro. Rep. 282).

Sec. 6. Effect of the Bill.

A bill of particulars does not change the nature of the action. (*Seaman v. Low*, 4 Bosw. 337). It is only an amplification of the pleading, and to be construed as a part of it. (*Bowman v. Earl*, 3 Duer, 691). It forms no part of the record, however, and the party cannot plead to it. (*Kreiss v. Seligman*, 8 Barb. 439; *Arrow Steamship Co. v. Bennett*, 23 Civ. Pro. Rep. 234). The evidence in the case, and the recovery of the party, must be limited to the matters set forth in the bill of particulars (*Bowman v. Earl*, 3 Duer, 691; *Morrison v. L'Hommodieu*, 44 N. Y. Supp. 79); except in so far as proof of items not included therein are material on some other point. (*Dodge v. Weil*, 158 N. Y. 346). If, however, other items are proved without objection, they may be allowed. (*Dubois v. D. & H. C. Co.*, 12 Wend. 334; *Chadbourne v. Del. Lack. & W. R. R. Co.*, 6 Daly, 215). Such objection must be taken when the evidence is offered. (*Colrick v. Swinburne*, 105 N. Y. 503). So, if the defendant prove items

of the plaintiff's account, which are not in the bill of particulars, the plaintiff may recover the amount of such items. (*Williams v. Allen*, 7 Cow. 316). A party will be held more strictly to allegations in the bill of particulars, than to those in the complaint. Time, although not material in the complaint, may be quite material in the bill of particulars. (*Quin v. Astor*, 2 Wend. 577). Slight variances between the bill and the evidence, which do not mislead, will not be regarded. (*Duncan v. Ray*, 19 Wend. 530). A party cannot object at the trial, that the bill of particulars is not sufficiently definite. (*Barnes v. Henshaw*, 21 Wend. 426). A bill furnished voluntarily is equally binding with one furnished pursuant to an order of the court. (*Payne v. Smith*, 19 Wend. 122).

Sec. 7. Penalty for Disobedience.

The penalty for disobedience may be inserted in the order for the bill of particulars. (*Dwight v. Germania Life Ins. Co.*, 84 N. Y. 493, 505). If not so inserted, the party may apply upon motion afterwards, that the court direct the penalty for refusal to furnish the bill; and such penalty may be either that he shall be precluded from giving evidence of the matters directed to be stated; or his proceedings may be stayed until he complies with the order; or his pleading may be stricken out. (*Gross v. Clarke*, 87 N. Y. 272; *Wilson v. Fowler*, 44 Hun, 89). But the court is reluctant to use this power to strike out a pleading. (*Raff v. Koster*, 37 App. Div. 534). If the bill of particulars is evasive, and the court can see that it was not furnished in good faith, it may punish the party as for a disobedience to the order. (*Wetmore v. Jennys*, 1 Barb. 53).

ARTICLE VII.

AMENDMENTS OF PLEADINGS.

SECTION.

1. Amendments of course.
2. Amendments by leave of the court.
 - Subd. 1.—Before trial.
 - Subd. 2.—At the trial or hearing.
 - Subd. 3.—After trial.
3. Supplemental pleadings.
4. Terms of amendment.

Sec. 1. Amendments of Course.

Within twenty days after a pleading, or the answer, demurrer or reply thereto, is served, or at any time before the period for answering it expires, the pleading may be once amended by the party, of course, without costs, and without prejudice to the proceedings already had. But if it is made to appear to the court, that the pleading was amended for the purpose of delay, and that the adverse party will thereby lose the benefit of a term, for which the cause is or may be noticed, the amended pleading may be stricken out, or the pleading may be restored to its original form, and such terms imposed as the court deems just. (Co. Civ. Proc. § 542). The summons is not amendable of course, under this section. (*Walkenshaw v. Perzel*, 7 Robt. 606; *Mapes v. Brown*, 14 Abb. N. C. 94). The right to amend once under this section is absolute. (*Cooper v. Jones*, 4 Sandf. 699). In the exercise of it, the plaintiff is authorized to amend his complaint by setting forth a new cause of action; and the right is not restricted to setting forth a cause of action of the same class as that contained in the original complaint. He may abandon the original cause of action and include in the amended complaint, one or more causes of action of a different class, subject only to the restriction that they all belong to the same class. (*Brown v. Leigh*, 49 N. Y. 78). A party may change the demand for relief (*Getty v. Hudson River R. R. Co.*, 6 How. Pr. 269); or may change the place of trial (*Stryker v. N. Y. Exchange*

Bank, 42 Barb. 511) ; but he cannot set up matter occurring after the action was begun ; that can only be done by supplemental pleading. (*Anthony v. Day*, 5 Wk. Dig. 240). But one amendment of course, is allowed under this section. (*Sands v. Calkins*, 30 How. Pr. 1). Such amendment of course may be had even when there has been a previous amendment by order of the court. (*Lintzenich v. Sterens*, 3 N. Y. Supp. 394). An amended pleading cannot be stricken out under the provisions of this section, as interposed for delay, unless it is made to appear not only that it was served for such a purpose, but also that the effect of its service is to prevent a trial at the ensuing term ; so, if on serving an amended pleading, the party seeking to amend stipulates to try the cause at the term for which it is noticed, such amended pleading should not be stricken out. (*Harvey v. The Provident Sav. etc. Soc.*, 41 App. Div. 410). If a pleading, which requires an answer, is served by mail, it may be amended within forty days after the service ; but if the pleading does not require an answer, the time for amendment of course is only twenty days, although it is served by mail. (*Toomey v. Andrews*, 48 How. Pr. 332 ; *Armstrong v. Phillips*, 20 Civ. Proc. Rep. 399). An order extending the time to reply, does not extend the time to serve an amended complaint. (*Dawson v. Bogart*, 10 Civ. Proc. Rep. 56). Nor does an order extending defendant's time to answer extend the plaintiff's time to amend his complaint. (*Albert Palmer Co. v. Shaw*, 64 How. Pr. 80). Noticing the action for trial, is not a waiver of the right to amend of course. (*Clifton v. Brown*, 27 Hun, 231 ; *Dayckinck v. N. Y. Elevated R. R. Co.*, 49 Super. 244). But it is too late, after the taking of proofs after issue is joined. (*Snyder v. White*, 6 How. Pr. 321). Where the plaintiff examines the defendant before trial, he does not thereby waive his right to serve an amended complaint. (*Stilwell v. Kelly*, 37 Super. 417). But where the defendant, in pursuance of an order giving him further time to answer, waives notice of trial, and consents to place the cause on the calendar, and to a reference of the issues, he waives his right to serve an amended answer. (*Schwab v. Wehrle*, 14 Wk.

Fig. 529). Adding a verification, is not an amendment under this section (*Bishop v. Sullivan*, 3 Law Bull. 7); nor is a change of parties (*Billings v. Baker*, 6 Abb. Pr. 213); nor a change which does not alter the legal effect of the pleadings. (*Snyder v. White*, 6 How. Pr. 321). After a demurrer has been served, the defendant cannot serve an answer in place thereof as an amendment under this section. (*Cashman v. Reynolds*, 123 N. Y. 138). Where, however, the defendant's demurrer has been overruled with leave to plead over, and the defendant has answered in accordance with such leave, an amended answer can be served within twenty days after the service of the answer. (*Rodkinson v. Gantz*, 26 Misc. 268; *affd.* on op. below, 39 App. Div. 670). An amended complaint supersedes the original. (*Sands v. Calkins*, 30 How. Pr. 1; *N. Y. Wire Co. v. Westinghouse, etc. Co.*, 85 Hun. 269). But the original pleading is still admissible in evidence. (*Fogg v. Edwards*, 20 Hun, 90). The amendment of the complaint relates to the beginning of the action, and prevents the running of the statute of limitations against a cause of action not in the original complaint. (*Ward v. Kalbfleisch*, 21 How. Pr. 283).

Where a pleading is amended as prescribed in the last section (Co. Civ. Proc. § 542), a copy thereof must be served upon the attorney for the adverse party. A failure to demur to, or answer the amended pleading, within twenty days thereafter, has the same effect as a like failure to demur to or answer the original pleading. (Co. Civ. Proc. § 543).

An amendment of the pleading defeats a motion to make it definite and certain (*Spuyten Duyvil R. M. Co. v. Williams*, 1 Civ. Proc. Rep. 280); or a motion to strike out for want of a proper verification. (*Rider v. Bates*, 66 How. Pr. 129). And an amendment of the answer defeats a motion for judgment on account of the frivolousness of it (*Burrall v. Moore*, 5 Duer, 654); or for a severance of the action and judgment (*N. Y. Wire Co. v. Westinghouse, etc. Co.*, 85 Hun, 269); but where an action was not brought in the proper county, and the defendant has served a demand to change the place of trial, a subsequent amendment of the pleading, by chang-

ing the place of trial to the county in which the plaintiff is a resident, does not defeat a motion previously made to change the place of trial to the county of defendant's residence. (*Rector v. Ridgwood Ice Co.*, 38 Hun, 293; affd. without opinion, 101 N. Y. 656). The same rule applies where the motion to change the place of trial is based upon the ground that an impartial trial cannot be had in the county where the venue is laid. (*Moulton v. Beecher*, 1 Abb. N. C. 193, 238, 239). An amendment of course supersedes a notice of trial. (*Ostrander v. Conkey*, 20 Hun, 421). If an amendment is unauthorized, the remedy is to move to strike out the pleading; and if it be made to appear that the amendment was in bad faith and for delay, and that the opposite party will lose the benefit of a term for which the case might have been noticed, the motion will be granted. (*Clifton v. Brown*, 27 Hun, 231). If a party refuse to receive an amended pleading, and proceed as though it had not been served, he does so at his peril, if he fail to establish that the pleading was served in bad faith and for purposes of delay. (*Vanderbilt v. Bleeker*, 4 Abb. Pr. 289).

Sec. 2. Amendments by Leave of the Court.

Subdivision 1.—BEFORE TRIAL.

The court may, at any stage of the action, in furtherance of justice, and on such terms as it deems just, amend any pleading, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case. (Co. Civ. Proc. § 723). This section is declaratory of the inherent power of courts to amend. (*Christal v. Kelly*, 88 N. Y. 285). The power given to the court by the code, is exceedingly broad and comprehensive, and includes the right to make almost any amendment which may be required in furtherance of justice. It was held by two judges in the case of *Robertson v. Robertson* (9 Daly 44), that the court could only allow amendments to the pleadings in the precise cases prescribed by the statute and substantially that there was no right of amendment,

except such as was given by the statute. In that case, and the case of *Diamond v. Williamsburgh Ins. Co.* (4 Daly, 494), it was held that it was not within the power of the court, to direct an amendment of the complaint, which should set up a new cause of action. The same thing was also held in the case of *Van Syckels v. Perry* (3 Robt. 621), at a special term of the superior court. But in *Byrnes v. Dunn* (6 Wk. Dig. 140), it was held that at the special term there was no limit to the power of amendment, if a sound discretion was exercised. In *Hatch v. The Central National Bank* (78 N. Y. 487), the court of appeals held, that the court had power at special term, to order an amendment of the complaint, setting up a new cause of action, although the statute of limitations had run against it. It was held in *Sheldon v. Adams* (18 Abb. Pr. 405), and in *Rowell v. Moeller* (91 Hun, 241), that the court had power to allow a new cause of action to be added by amendment, though the statute of limitations was thereby avoided; but that this should be done in furtherance of justice, and should not be allowed except in extreme cases. The recent case of *Deyo v. Morss* (144 N. Y. 216), seems to have settled beyond doubt that the court has power to allow an amendment of the complaint, setting up a new cause of action. There was never any doubt of its power to allow an amendment, changing the nature of the action. And it has been held that it was proper to change the nature of the action, from one for the breach of warranty, to an action for damages on the ground of deceit (*Eighmie v. Taylor*, 39 Hun, 366); or from one for the specific performance of a contract, to an action for damages for the failure to perform it (*Beck v. Allison*, 56 N. Y. 366, 373); or from an action of conversion to an action of replevin (*Dows v. Green*, 3 How. Pr. 377); or from an action for an injunction to one to recover a money judgment for damages (*Vincent v. King*, 13 How. Pr. 234); or to change the complaint so as to demand damages for an increased amount, in an action for negligence. (*Reed v. Mayor, etc.*, 97 N. Y. 620). The court may amend the summons and complaint by bringing in new parties defendant. (*Lewin v. Wright*, 31 Hun, 327); but it has

not power to allow an amendment by bringing in new parties, against whom the statute of limitations has run (*Shaw v. Cock*, 12 Hun, 173; 78 N. Y. 194); nor by striking out the name of one party as defendant, and inserting the names of others. (*N. Y. S. M. Milkpan Ass'n v. Remington Agricultural Works*, 89 N. Y. 22). When by inadvertence an action has been begun in the name of an insolvent corporation, the court has power to allow an amendment substituting the receiver of the corporation as the plaintiff (*Hulbert Bros. Co. v. Hohman*, 22 Misc. 248); so also where the action has been begun by the president of a company, erroneously supposed to be an association, but in reality a corporation, the complaint will be amended so that the corporation shall appear as the party plaintiff. (*Dean v. Gilbert*, 92 Hun, 427). Where an unincorporated association is sued as a corporation and the summons and complaint are served on the president, the court has power to allow the summons and complaint to be amended by making the president the party defendant. (*Munzinger v. Courier Co.*, 82 Hun, 576). Where a citation inadvertently omitted to add "as executors" to the names of individuals, the surrogate has power under this section to allow an amendment adding those words. (*Matter of Soule*, 46 Hun, 661; affd. without opinion, 109 N. Y. 662). It is settled also that the court has power to allow an amendment of an answer by setting up a new defense (*Union Nat'l Bk. v. Bassett*, 3 Abb. Pr. N. S. 359; *Diamond v. Williamsburgh Ins. Co.*, 4 Daly, 494); or a counterclaim. (*Beardsley v. Storer*, 7 How. Pr. 294). The power of amendment is conducive to the administration of justice, and it will be liberally allowed in a proper case (*T. & B. R. R. Co. v. Tibbits*, 11 How. Pr. 168); although after a new trial has been ordered. (*Schreyer v. Mayor, etc.*, 39 Super. 277). While the question of allowing amendments rests in sound discretion (*Cunliff v. The D. & H. C. Co.*, 4 N. Y. St. Rep. 775), they are allowed almost as a matter of course. (*Gilchrist v. Gilchrist*, 44 How. Pr. 241). No discrimination will be made against unconscionable defenses, so called, such as usury, or the statute of limitations. (*Barnett v. Meyer*, 10 Hun, 109). The power

may be exercised by the court, although the action is on trial before a referee. (*Bullock v. Bemis*, 40 Hun, 623).

The application must be made with reasonable diligence. (*Gowdy v. Poullain*, 2 Hun, 218; *Dudley v. Broadway Ins. Co.*, 42 App. Div. 555). But the leave to amend will not be denied because of delay, where the delay was caused by the negligence of the opposite party. (*Bradley v. Sheehy*, 2 Wk. Dig. 589). A public corporation will not be held to as strict diligence upon such application, as an individual. (*Lunney v. Mayor*, 14 Wk. Dig. 140). An amendment will not be permitted, for the purpose of setting up facts which were known to the party at the time of serving the original pleading, unless the omission is excused. (*Stedeker v. Bernard*, 10 Daly, 466; *Cornwall v. Cornwall*, 30 Hun, 473). In the application for leave to amend, some good reason should be shown (*Bewley v. Equitable Life Ins. Co.*, 10 Wk. Dig. 191); and some excuse must be given for the existence of the defect. (*Harrington v. Slade*, 22 Barb. 161). Where the defendant stipulates that the plaintiff may serve an amended complaint, it is equivalent to an order authorizing such amendment. (*Deyo v. Morss*, 144 N. Y. 216). After appearance, the application must be made upon notice to the opposite party. A copy of the pleading as proposed to be amended, must be served with the motion papers, or the motion will be denied. (*Stern v. Knapp*, 52 Super. 14). The order should direct that the proposed pleading should be served, or should stand as the new pleading in the case, and the party will be confined to the pleading proposed by his motion papers. (*New v. Aland*, 62 How. Pr. 185). An order permitting a party to serve such an amended pleading as he should be advised, was held to be erroneous. (*New v. Aland*, *supra*). Ordinarily the court will not examine to see whether the pleading is good, if it is not clearly frivolous (*Mitchell v. Allen*, 25 Hun, 543); or whether it can be established by the proof. (*Muller v. Muller*, 21 Wk. Dig. 287). But if with the amendment, the pleading would be clearly demurrable (*Hoffman v. Hoffman*, 35 How. Pr. 384); or if it is made clear that it will not

be sustained by the proof, the amendment will not be allowed. (*Muller v. Muller*, 21 Wk. Dig. 287). An order permitting or denying an amendment is appealable to the appellate division, but the order of the special term will not be reversed except for an abuse of discretion. (*Dudley v. Broadway Ins. Co.*, 42 App. Div. 555).

Subdivision 2.—AT THE TRIAL OR HEARING.

The power of amending the pleading at the trial is given by section seven hundred and twenty-three of the code of civil procedure, and a referee has the same power upon the trial of an action before him as the court. (Co. Civ. Proc. § 1018; *Bullock v. Bemis*, 40 Hun, 623). The directions for exercising this power are found in sections five hundred and thirty-nine, five hundred and forty, and five hundred and forty-one of the code of civil procedure, which are as follows:

§ 539. A variance, between an allegation in a pleading and the proof, is not material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. If a party insists that he has been misled, the fact, and the particulars, in which he has been misled, must be proved to the satisfaction of the court. Thereupon the court may, in its discretion, order the pleading to be amended, upon such terms as it deems just.

§ 540. Where the variance is not material, as prescribed in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

§ 541. Where, however, the allegation to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance, within the last two sections, but a failure of proof.

It is extremely difficult, if not impossible, to deduce from the cases any rule as to what power of amendment at the trial the court has under these sections. The court of appeals has very recently established one basic proposition. In *Martin v. Home Bank* (160 N. Y. 190, 197),

the court says: "When a cause of action, however stated, is sustained by the same proof, the power of the court under this section [723] to conform the statement in the pleading to the facts proved is undoubted." In that case the court sustained an amendment on the trial which changed an action brought to recover damages for the defendant's failure to present a check within a reasonable time, into one to recover the same money on the ground that plaintiff had paid it to the defendant under mistake. It seems to have been determined at an early date, however, that a new cause of action could not be brought in on an amendment at the trial (*Hempstead v. N. Y. C. R. R. Co.*, 28 Barb. 585; *Reeder v. Sayre*, 70 N. Y. 180, 190); and it has been said that this is the only limitation on the power. (*Harris v. Tumbridge*, 83 N. Y. 92, 97). It has been held, however, that even this limitation is only upon the power of the court to conform the pleadings to facts proven and is not applicable to a motion to amend at the opening, or during the early stages of the trial. (*Madders v. Whallon*, 74 Hun, 372; *Tooker v. Arnoux*, 76 N. Y. 397, 402). The court of appeals has also laid down a rule to determine whether or not a new cause of action is introduced by an amendment. In *Davis v. N. Y. L. E. & W. R. R. Co.* (110 N. Y. 646), the court says: "It is a fair test, to determine whether a new cause of action is alleged in the amended complaint, that a recovery had upon the original complaint would have been a bar to any recovery under the amended complaint."

There is not space to set out instances of certain specific amendments which have been allowed or disallowed. The rule is, doubtless, fairly stated where it is said that the court has power to make practically any amendment of the complaint which does not affect the issue upon the determination of which the plaintiff's right to relief depends, or which does not bring in a new cause of action. (*Price v. Brown*, 98 N. Y. 388). Subject to this limitation, the pleading may be amended at the trial by inserting new allegations (Co. Civ. Proc. § 723), not only so as to conform it to the proof, but by inserting material allegations as to which no proof has

been given (*Smith v. Rathbun*, 75 N. Y. 122) ; by striking out immaterial allegations (*Meyer v. Feigel*, 7 Robt. 122) ; or by conforming the pleading to the facts proved (*Hunter v. H. R. I. & M. Co.*, 20 Barb. 293) ; or by increasing the amount of damages claimed in the complaint. (*Knapp v. Roche*, 62 N. Y. 614). The power of the court to amend the pleading to conform to the facts brought out on the trial is never to be exercised where those facts have been proved over the objection and exception of the party against whom they are offered ; it is only allowable where the proof has been admitted without objection and the attention of the party offering the evidence has not been called to the defect in pleading. (*Bossert v. Poerschke*, 51 App. Div. 381). It seems that a complaint setting up no cause of action whatsoever cannot be amended on the trial so as to conform to facts which show a cause of action. (*Clement v. Beale*, 53 App. Div. 416 ; *Wheeler v. Hall*, 54 App. Div. 49). So the answer cannot be amended at the trial so as to set up a new defense, although such an amendment might have been allowed upon an application to the special term before trial. (*Abbott v. Meinken*, 48 App. Div. 109). Although there may be a variance between the proof and the complaint, if it is immaterial the court is required by section five hundred and forty of the code of civil procedure, to disregard it, or order an immediate amendment. A variance is always immaterial unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. (Co. Civ. Proc. § 539). Section 541 must be borne in mind in this connection ; so wherever there is an entire failure of proof section 539 is not applicable. (*Southwick v. First Nat'l Bk.*, 84 N. Y. 420). What is an entire failure of proof must depend upon the pleadings and facts of each case. Upon a declaration in tort there cannot be a recovery in contract. (*Degraw v. Elmore*, 50 N. Y. 1). Upon an action on an account stated, there can be no recovery on contract, without an amendment. (*Volkening v. DeGraaf*, 81 N. Y. 268). It is not left to the judgment of the court whether in a given instance the variance was calculated to mislead, and from this to hold that it did

mislead; but whenever it is alleged that a party has been misled, that fact must be proved to the satisfaction of the court, and the proof must show in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as may be just. (*Catlin v. Gunter*, 11 N. Y. 374; Co. Civ. Proc. § 539; *Place v. Minster*, 65 N. Y. 89, 99). The granting or refusing the application to amend upon the trial, is entirely discretionary with the tribunal to which it is made, and the determination of the trial court is not to be set aside on appeal unless there was an abuse of discretion. (*Rosenwald v. Hammerstein*, 12 Daly, 377; *Lanpher v. Clark*, 77 Hun, 506), or such determination is based on a supposed want of power. (*Oregon S. S. Co. v. Otis*, 27 Hun, 452). But an order of the court or referee, amending a pleading at the trial, cannot be reviewed by motion. (*Quimby v. Claflin*, 77 N. Y. 270). If upon the trial the referee has doubt of his power to make the amendment, he may adjourn the hearing in order to allow the party to make an application to the court. (*Hochstetter v. Isaacs*, 44 How. Pr. 495). The application may be made to the court at special term, without leave of the referee, during an adjournment of the trial. (*Bullock v. Bemis*, 40 Hun, 623). Of course, the terms upon which an amendment is to be allowed are always within the sound discretion of the court. (See *Infra*).

Subdivision 3.—AFTER TRIAL.

No amendments of pleading will be allowed after trial, except those which sustain the judgment, and they will never be allowed, when the effect would be to require a new trial. (*English v. Furniss*, 3 Abb. Pr. 82; *Volkening v. DeGraaf*, 81 N. Y. 268). Whenever the court below should have directed the amendment to be made, the case may be argued upon appeal, as if it were actually made to conform to the facts proved. (*Bowdoin v. Coleman*, 6 Duer, 183; *Harrower v. Heath*, 19 Barb. 331; *Reeder v. Sayre*, 70 N. Y. 180). The general term may, upon appeal, amend the pleading, to conform to the facts proved (*Harris v. Tumbridge*, 83 N. Y. 92); and so may

the court of appeals, in order to sustain the judgment. (*Pratt v. Hudson River R. R. Co.*, 21 N. Y. 305). But a pleading will not be amended on appeal or the defect disregarded where the pleader's attention was called to the defect on the trial and he failed to ask for an amendment at that time. (*Gill v. Ætna Live Stock Co.*, 82 Hun, 363; *Bossert v. Poerschke*, 51 App. Div. 381). The amendment may be allowed upon a motion for new trial, on the judge's minutes. (*Thomas v. Nelson*, 69 N. Y. 118). No amendment can be allowed after the trial, which would substantially change the cause of action or defense, as alleged, or the nature of the cause of action. (*Southwick v. First National Bank*, 84 N. Y. 420, 428). The court, after verdict, cannot allow an amendment of the complaint by increasing the amount of damages demanded, without ordering a new trial (*Pharis v. Gere*, 31 Hun, 443); but in *Schultz v. Third Avenue R. R. Co.* (89 N. Y. 242), where the complaint contained three counts, in the first of which the plaintiff asked damages to the amount of ten thousand dollars, and in the prayer for relief he asked damages to the amount of twenty thousand dollars; it was held that the general prayer for damages at the close of the complaint controlled; but that if in order to sustain a recovery for the amount of fifteen thousand dollars upon the first count, it was necessary that the count should have alleged fifteen thousand dollars damages, the defect was one that could be amended upon appeal.

Sec. 3. Supplemental Pleadings.

Upon the application of either party, the court may, and, in a proper case, must, upon such terms as are just, permit him to make a supplemental complaint, answer, or reply, alleging material facts which occurred after his former pleading, or of which he was ignorant when it was made; including the judgment or decree of a competent court, rendered after the commencement of the action, determining the matter in controversy, or a part thereof. The party may apply for leave to make a supplemental pleading, either in addition to, or in place of,

the former pleading. In the former event, if the application is granted, a provisional remedy, or other proceeding already taken in the action, is not affected by the supplemental pleading; but the right of the adverse party to have it vacated or set aside, depends upon the case presented by the original and supplemental pleadings. (Co. Civ. Proc. § 544). Supplemental pleadings can never be served without leave of the court. (*Spears v. Mayor*, 72 N. Y. 442). The application for leave must be upon notice (*Fleischmann v. Bennett*, 79 N. Y. 579); and the proposed supplemental pleading should be part of the motion papers. (*Newell v. Newell*, 27 Misc. 117). Notwithstanding the mandatory language of section five hundred and forty-four of the code, it is the duty of the court upon the application, to consider all the circumstances, and to grant or refuse it, as may be just or proper in the particular case. (Id.). The exercise of this discretion is reviewable by the appellate division, but not by the court of appeals. (Id.). The appellate division will not interfere with the discretion of the lower court, unless it is clearly apparent that there was an abuse of its exercise. (*Patterson v. Hare*, 74 Hun, 269). The court may refuse leave, wherever laches or fraud is shown, or where it appears that injustice would be worked by allowing it. (*Holyoke v. Adams*, 59 N. Y. 233, 237). Laches is always a good ground for denying the application. (*McDonald v. Davis*, 12 Hun, 95). The court, however, must grant leave, unless the motion papers show a case in which it may exercise a discretion upon the subject. (*Holyoke v. Adams*, 59 N. Y. 233, 237). Leave to serve a supplemental complaint ought not to be withheld, unless the object of the application is delay, or it is not made in good faith. (*Williams v. Hays*, 13 N. Y. St. Rep. 489). In passing upon an application, the court will not usually examine whether the facts constitute a cause of action, or defense, unless the pleading is clearly bad. (*Latham v. Richards*, 15 Hun, 129; *Mitchell v. Allen*, 25 Hun, 543; *Tift v. Bloomberg*, 49 Super. 323). If clearly bad, the supplemental pleading will not be allowed. (*Gerstein v. Fischer*, 12 Misc. 211; affd. 14 Misc. 644). The object of the supplemental

pleading is to set up facts consistent with and in aid of the original pleading (*Tiffany v. Bowerman*, 2 Hun, 643) ; or which have happened, or come to the knowledge of the pleader, since the commencement of the action, or after the original pleading was served. (*Holyoke v. Adams*, 59 N. Y. 233). The distinction between amended and supplemental complaints, in this respect must be borne in mind. (*Oelberman v. N. Y. & N. R. R. Co.*, 61 N. Y. St. Rep. 615). Facts occurring since the commencement of the action cannot be proved, unless so set up. (*Hull v. Olney*, 65 Barb. 27). If the original complaint is sufficient to entitle the plaintiff to one kind of relief, he may by supplemental complaint, be allowed to set up facts occurring afterwards, which would entitle him to other or more extended relief. (*Latham v. Richards*, 15 Hun, 129). But if the original complaint sets up no cause of action, or if he has no cause of action at the time of the commencement of the action, the plaintiff cannot be allowed to set up by supplemental complaint afterwards, facts subsequently occurring (*Stanton v. Swann*, 10 Civ. Pro. Rep. 12) ; or shift the ground of his action to such subsequently occurring facts (*Muller v. Earl*, 37 Super. 388) ; nor can he set up a new cause of action, which did not exist when the original suit was commenced. (*Bostwick v. Menck*, 4 Daly, 68; *Tiffany v. Bowerman*, 2 Hun, 643). Plaintiff will not be allowed to serve a supplemental complaint to set up a cause of action, barred by the statute of limitations. (*Miller v. Johnson*, 10 Civ. Proc. Rep. 205). It is, however, no answer, to the application that the new facts furnish a basis for a new cause of action, if they grow out of the original cause of action, and are a continuance of it. (*Latham v. Richards*, 15 Hun, 129). It is almost a matter of course to allow a supplemental answer to be served, and it may set up any facts occurring since the former answer, or of which the defendant was ignorant at the time of answering, which constitute a defense to the cause of action (*Hoyt v. Sheldon*, 4 Abb. Pr. 59), or which tend to mitigate the plaintiff's damages. (*Cothran v. Hanover National Bk.*, 40 Super. 401). For

instance, the defendant has been permitted to set up his discharge in bankruptcy (*Hadley v. Boehm*, 1 Hun, 304); or an accord and satisfaction (*Christy v. Perkins*, 6 Daly 237); or a release of the cause of action (*Mitchell v. Allen*, 25 Hun, 543); or a payment by one joint debtor (*Brown v. Richardson*, 7 Robt. 57); if such defenses occurred after the first answer. In an action for divorce on the ground of adultery, the defendant was permitted to set up the adultery of the plaintiff, discovered after issue was joined, either as a defense (*Strong v. Strong*, 28 How. Pr. 432), or as a counter-claim. (*Blanc v. Blanc*, 67 Hun, 384). In an action for a separation, leave was granted to serve a supplemental complaint setting up acts of cruelty committed after the commencement of the action. (*Cornwall v. Cornwall*, 30 Hun, 573). Such subsequent acts could not be the foundation of an action, as that would be allowing the plaintiff to recover on a cause of action which had accrued since the action was commenced, but such acts were allowed to be pleaded as giving color to what was the basis of the action and showing that the ill-treatment was likely to continue. So, also, in an action for libel, the court may allow a supplemental complaint setting up the republication after the commencement of the action; this shows aggravation of the injury. (*Corbin v. Knapp*, 5 Hun, 197). The plaintiff in an action for absolute divorce, however, will not be allowed to serve a supplemental complaint setting up acts of adultery committed by the defendant since the commencement of the action. (*Halsted v. Halsted*, 7 Misc. 23; *Neiberg v. Neiberg*, 8 Misc. 97). But a supplemental answer will never be allowed, to enable the defendant to set up a technical defense, in order to defeat a just claim. (*Holyoke v. Adams*, 59 N. Y. 233). A supplemental reply may be allowed whenever a proper case is made. (*Ormsbee v. Brown*, 50 Barb. 436). A supplemental pleading is amendable once as of course. (*Divine v. Duncan*, 52 How. Pr. 446). The general term of the first department refused to decide this point in *Wetmore v. Hegeman* (6 Wk. Dig. 361); though the order of the special term holding the

supplemental complaint amendable as of course was affirmed. The supplemental pleading may be in addition to, or in place of, the original pleading. (Co. Civ. Proc. § 544). If it is in addition to the original pleading, the first pleading is still a part of the record, and the two are to be read together, and are to be regarded as one pleading. (*McRobert v. Pooly*, 1 N. Y. State Rep. 725). A demurrer must be to both the original and supplemental complaints in such a case (*Hayward v. Hood*, 8 N. Y. St. Rep. 457). Where a person is substituted for the original defendant, under section 820 of the code of civil procedure, the plaintiff should ask, and be allowed, to file a supplemental complaint as against the person so substituted. (*Wilson v. Lawrence*, 8 Hun, 593). So, also, where an application is made by a plaintiff to bring in a person as defendant who may be made a party under sections 755-759, of the code of civil procedure, upon a transfer of interest or devolution of liability or the death of a party, the court may direct that a supplemental summons issue, and that supplemental pleadings be made. (Co. Civ. Proc. § 760). Where an action is brought by a creditor of a corporation to sequester its property, and the stockholders, directors, trustees, or other officers, or any of them are made liable by law in any event or contingency, for the payment of his debt, the persons, so made liable, may be made parties defendant by the original or by a supplemental complaint; and their liability may be declared and enforced by the judgment in the action. (Co. Civ. Proc. § 1790).

Sec. 4. Terms of Amendment.

The terms on which an amendment will be granted are always discretionary with the court or referee. They are usually costs of the motion, and such other costs and expenses as the party will lose, or be put to, by reason of the amendment. (*Gilchrist v. Gilchrist*, 44 How. Pr. 317). The question is one of discretion, and there is no governing rule furnished by the adjudications, which excludes the circumstances of each particular case from consideration on such an application. The general rule is, that in the allowance of amendments which change

substantially the nature or subject of the cause of action, such terms are imposed as may indemnify the defendant for his taxable costs incurred in the action, provided he has raised the objection at the first opportunity. But when the litigation has proceeded without reference to the character of the pleadings, that fact is considered in the imposition of terms; and then such rule is not deemed the governing rule, nor necessarily the guiding one for the discretion of the court. (*Marsh v. McNair*, 40 Hun, 216, 222). On motion before trial, if the amendment merely perfects a defective pleading and makes no change in the issue, only motion costs will be imposed. The following authorities are referred to, as illustrating the rules applied by the court in granting amendments to the pleadings. In *Carrier v. Dellay* (3 How. Pr. 173), where a new cause of action was permitted to be set up, to obviate an objection promptly taken by the defendant, the plaintiff was required to pay ten dollars costs of the motion, and the costs of the action to the date of the amendment, except costs before notice of trial. So, also, in *Nanetty v. Naylor* 2 Law Bull. 65, 66). Where an amendment to the complaint presented new issues and required a new defense, the plaintiff was required to pay all of the defendants' costs. (*Troy & Boston R. R. Co. v. Tibbitts*, 11 How. Pr. 168; *Bates v. Salt Springs Nat'l Bk.*, 43 App. Div. 321). Where there had been two trials, and the objection which required the plaintiff to ask for an amendment was only taken at the second trial, plaintiff was allowed to amend on payment of the defendant's costs, from and including the second trial (*Marsh v. McNair*, 40 Hun, 216), but in a similar case where there had been an appeal, in which the party opposing the amendment had been successful, the conditions of amendment were the costs awarded on said appeal and motion costs. (*Ireland v. Met. El. Ry. Co.*, 8 N. Y. State Rep. 127). An amendment of the answer is usually granted upon payment of ten dollars costs of the motion. But if as the result of it, the plaintiff desires to discontinue his action, it is proper to require from the defendant a waiver of all costs accruing after the original answer was served. (*Shanks v. Rac*, 19 How. Pr. 540). The

usual terms of granting amendments at the trial, or after the trial is begun, are the payment of costs of the term, and trial fee, and the witness fees. In *Smith v. Rathbun* (75 N. Y. 122), the referee, upon permitting an amendment of the complaint inserting material allegations, imposed as a condition, that the defendant be permitted to answer or demur to it; and the court held that such condition was proper. The expression "costs of the action to the present time," means such costs as would go to the party against which the amendment is allowed, if there had been, at that time, a termination of the action favorable to him. (*Havemeyer v. Havemeyer*, 44 Super. 170). If the party applying for the amendment, avails himself of it, he cannot complain of the terms imposed. (*Smith v. Rathbun*, 75 N. Y. 122). A party cannot appeal from that part of the order imposing the conditions. If he appeal at all, it must be from the whole order. (*Havemeyer v. Havemeyer*, 44 Super. 170). The terms upon which supplemental pleadings are granted are always in the discretion of the court. (Co. Civ. Proc. § 544). They must always be imposed by the court. (*Staunton v. Swann*, 10 Civ. Pro. Rep. 12). In the imposition of terms, the rules herein stated as applying to ordinary amendments, are applied to applications to serve supplemental pleadings. The court may require as a condition of serving a supplemental answer, that the defendant shall waive all other defenses than that set out in his answer. (*Bate v. Fellowes*, 4 Bosw. 638). In the case of *Wilcox v. Daggett* (15 Wk. Dig. 208), the imposition of a trial fee was held proper. In *Mabie v. Adams* (1 Law Bull. 65), where the trial had been concluded, and the decision of the referee had been made, it was held proper to impose, as a condition of filing a supplemental answer, the payment of an additional allowance; but if the trial was still pending, it was held that the court had no power to impose such terms. (*Jenkins v. Adams*, 1 Law Bull. 65).

ARTICLE VIII.

FRIVOLOUS PLEADINGS.

If a demurrer, answer, or reply is frivolous, the party prejudiced thereby, upon a previous notice to the adverse party, of not less than five days, may apply to the court, or to a judge of the court, for judgment thereupon, and judgment may be given accordingly. If the application is denied, an appeal cannot be taken from the determination, and the denial of the application does not prejudice any of the subsequent proceedings of either party. Costs, as upon a motion, may be awarded upon an application pursuant to this section. (Co. Civ. Proc. § 537).

A party is not at liberty to treat a pleading as a nullity, but he must move for judgment upon it under this section. (*Decker v. Kitchen*, 21 Hun, 332). Judgment cannot be given upon a counter-claim under this section (*Fettretch v. McKay*, 47 N. Y. 426); nor upon a reply denying a counter-claim. (*Wood v. Mayor*, 3 Abb. Pr. N. S. 467; appeal dismissed, 4 Abb. Pr. N. S. 152). It is no objection to the granting of the motion under this section, that the pleading is verified. (*Reed v. Latson*, 15 Barb. 9, 17). Upon the hearing of the motion, the allegations of the pleading are always assumed to be true. (*Livingston v. Hammer*, 7 Bosw. 670). A frivolous answer is one, which, although it may be true, controverts no material allegation of the complaint, and is so clearly bad that the defect appears upon a mere inspection, and indicates that it was interposed in bad faith. (*Cook v. Warren*, 88 N. Y. 37; *Carpenter v. Adams*, 34 Hun, 429; *Bedlow v. Stillwell*, 45 App. Div. 557). If an argument is necessary to show that the pleading is bad, it is not frivolous. (*Youngs v. Kent*, 46 N. Y. 672; *Wait v. Getman*, 32 App. Div. 168; *Manne v. Carlson*, 49 App. Div. 276). If there is a decision in point against the pleading, it will be held to be frivolous (*People v. McCumber*, 27 Barb. 632, 638); but not when the question is doubtful. (*Chauncey v. Lawrence*, 15 Abb. Pr. 106; *Chemical National Bank v. Carpentier*, 9

Abb. N. C. 301). The motive with which the pleading is interposed is not important. The only question is whether it is clearly bad upon its face. (*Hecker v. Mitchell*, 6 Duer, 687). To sustain an answer, it is not necessary that the defense be pleaded in proper form; if a defense is even shadowed forth in the pleading, the answer is not frivolous. (*Kelly v. Barnett*, 16 How. Pr. 135). The pleading will be sustained, if a material issue is presented, although there may be allegations in the pleading which are immaterial (*Munger v. Shannon*, 61 N. Y. 251); or if a fact necessary to enable the plaintiff to recover is denied, even if that fact is not alleged in the complaint (*Lord v. Cheesborough*, 4 Sand. 696); although it was not intended by the pleader to deny it. (*Youngs v. Kent*, 46 N. Y. 672). Where a part of the answer is good and part bad, the court cannot order judgment under this section. (*Strong v. Sproul*, 53 N. Y. 497). It would seem that this section, in so far as it covers a reply, means only a reply to a counter-claim and not a reply ordered by the court; the section is designed to give judgment to some one asking affirmative relief. (*Henriques v. Trowbridge*, 27 App. Div. 18). Judgment can never be granted because of the frivolousness of the defendant's pleading, if the complaint is defective in not stating a cause of action. (*Munger v. Shannon*, 61 N. Y. 251). Affidavits are not to be served for use on the motion (*Darrow v. Miller*, 5 How. Pr. 247; *Beal v. Union Paper Box Co.*, 4 Civ. Proc. Rep. 18); except that where the defendant makes default, the plaintiff must prove that he has received the pleading, and must present proof of service of notice of motion. (*Darrow v. Miller*, *supra*). A notice of motion must ask for judgment because of the frivolousness of the pleading. The frivolous pleading cannot be stricken out under this section. (*Rea v. Wash. Mut. Ins. Co.*, 6 How. Pr. 21; *Owens v. Hudnut's Pharmacy*, 20 Civ. Proc. 145; S. C., 35 N. Y. State Rep. 567; *Reese v. Walworth*, 61 App. Div. 64). In *Barton v. Griffin* (36 App. Div. 572), the majority of the court seems to have lost sight of the question of practice and to have considered only the sufficiency of the pleading; Mr. Justice Putnam, dissenting,

is clearly in accord with the authorities on the practice point. The motion may be made, although twenty days have not expired since the service of the defective pleading. (*Ross v. Ross*, 25 Hun, 642; *Lee v. Jacob*, 38 App. Div. 531). If it is so made, and an amended pleading is served, the motion must be denied. (*Burrall v. Moore*, 5 Duer. 654). A motion to strike out part of a pleading as sham, and for judgment upon the remainder as frivolous, may be joined. (*Adams v. McPartlin*, 11 Abb. N. C. 369). The right to relief under this section is not waived by answering the frivolous pleading. (*Stokes v. Hagar*, 1 Co. Rep. 84). On granting the motion, the court may give leave to amend on terms (*Snedecker v. Bernard*, 4 Law Bull. 31; *Fales v. Hicks*, 12 How. Pr. 153), if an affidavit of merits is presented by the defendant, but not otherwise. (*Bank of Lowville v. Edwards*, 11 How. Pr. 216). When judgment is ordered on account of the frivolousness of the pleading, the pleading itself is not struck out, but remains upon the record, and should be in the judgment roll. (*Strong v. Sproul*, 53 N. Y. 497). No appeal can be taken from an order denying a motion for judgment, under this section. (*Carpenter v. Adams*, 34 Hun, 429). Where a motion has been granted, and judgment has been ordered, and an appeal is taken, the order should be affirmed if the pleading is demurrable, although the court may be of the opinion that it is not frivolous. (*Wesley v. Bennett*, 5 Abb. Pr. 498; *Martin v. Kanouse*, 2 Abb. Pr. 327). See, however, the dictum in the recent case of *Wait v. Getman* (32 App. Div. 168, 171), *contra*.

ARTICLE IX.

SHAM PLEADINGS.

A sham answer, or a sham defense may be stricken out by the court, upon motion, and upon such terms as the court deems just. (Co. Civ. Proc. § 538).

This section confers no new power upon the court; but it is simply declaratory of the rule, as it existed at common law. (*Wayland v. Tysen*, 45 N. Y. 281). Part

of an answer, or part of a defense cannot be stricken out, under this section. (*Collins v. Coggill*, 7 Robt. 81; *Winslow v. Ferguson*, 1 Lans. 436). But, in the case of *Sherman v. Boehm* (15 Abb. N. C. 254), it was held that a denial of a part of the allegations in the complaint, coupled with other allegations in the same answer addressed to the same cause of action, might be stricken out as sham. A counter-claim cannot be stricken out under this section. (*Briggs v. Freedman*, 9 Civ. Pro. Rep. 73; *Baum's Castorine Co. v. Thomas*, 92 Hun, 1). Nor can a demurrer. (*Kain v. Dickel*, 46 How. Pr. 208).

The court has no power to strike out a general denial as sham (*Wayland v. Tysen*, 45 N. Y. 281); although the denial is upon information and belief (*Howe v. Ellwell*, 57 App. Div. 357), or only of knowledge or information sufficient to form a belief (*Robert Gere Bank v. Inman*, 51 Hun, 97; *affd.* on opinion below, 115 N. Y. 650; *Roby v. Hallock*, 5 Abb. N. C. 86); and although the defendant on examination before trial has admitted that it is false. (*Shultze v. Rodewald*, 1 Abb. N. C. 365; *Neuberger v. Webb*, 24 Hun, 347). But in *Sherman v. Boehm* (15 Abb. N. C. 254), the court of common pleas at general term held that an answer in these words "and further answering on information and belief, they deny each and every allegation and complaint constituting the plaintiff's first cause of action," might be stricken out as sham. This case must be considered as overruled by the later cases cited above. In *Howe v. Ellwell*, *supra*, the court refused to strike out as sham a denial upon information and belief even where a party would naturally be presumed to have knowledge of the truth or falsity of the allegation. See, however, *Pardi v. Conde* (27 Misc. 496).

A defense is sham, in the legal meaning of this term, which is so clearly false in fact, that it does not in reality involve any matter of substantial litigation. The chief characteristic of a sham defense is its undoubted falsity; a mere formal defense is sometimes designated as a false defense. The words "sham" and "false" applied to such a defense signify the same thing. Neither term necessarily includes the idea of an artful con-

struction of the plea, or doubt as to the legal character of the defense upon its face. The defense may be entirely clear in form, but nevertheless sham for the sole reason that it is false. (*People v. McCumber*, 18 N. Y. 315, 320, 321). The essential element of the sham defense is its falsity. (*Winslow v. Ferguson*, 1 Lans. 436). The power to strike out such a defense extends only to such affirmative defenses, as are not verified by the oath of the defendant, or other equivalent evidence. (*Wayland v. Tyssen*, 45 N. Y. 281). Ordinarily, such affirmative defenses should not be stricken out, if good on their face and verified. (*Albany County Bk. v. Rider*, 74 Hun, 349). It is only in an unusual case, where it appears that the answer is a mere pretense, set up in bad faith, for the purpose of vexation or delay that it should be stricken out; and in such case there should appear some fact outside of affidavits showing or tending to show the falsity of the answer. (*Id.*). The truth or falsity of the answer is not to be tried out on affidavits. Upon the motion, the falsity must clearly and decisively appear, and must not be left doubtful. (*Morey v. Safe Deposit Co.*, 7 Abb. Pr. N. S. 199). In the case of *McCarty v. O'Donnell* (7 Robt. 431), it was held that the answer should not be stricken out unless the defendant admits its falsity, expressly or by implication; or, by not denying, admits facts alleged against it to establish its falsity; or the answer is on information and belief alone, and the motion is made on the affidavits of those necessarily possessing knowledge; or the answer denies knowledge, information, or belief of facts, presumptively within the defendant's knowledge, and the motion is made on papers tending to show that he has knowledge, and he files no opposing papers. Wherever the falsity clearly appears, the answer may be stricken out for that reason alone. (*Id.*). Where from circumstances occurring after the answer has been served, it becomes false it may be stricken out as sham; as where the answer pleaded another action pending, which was afterwards discontinued. (*Clark v. Clark*, 7 Robt. 276). A verified complaint alone is not sufficient proof of the falsity of

the answer upon such a motion. (*Kellogg v. Baker*, 15 Abb. Pr. 286). The fact that the defendant believes the answer to be true, is not an answer to the application (*Roome v. Nicholson*, 8 Abb. Pr. N. S. 343); where the answer is verified on information and belief and the plaintiff swears positively that the answer is false, it will be stricken out. (*Kay v. Whittaker*, 44 N. Y. 465). The answer will not be stricken out because it is not properly framed, if it states facts which, properly pleaded, might be a defense (*Struver v. Ocean Ins. Co.*, 2 Hilt. 475); nor if there is upon the pleading a slight chance of the defendant's success. (*Keifer v. Thomass*, 6 Abb. Pr. N. S. 42). In an action upon a promissory note, where the answer admitted the making of the note, but averred that after its delivery it was materially altered by the plaintiff, without the defendant's knowledge or consent, by changing the date, it was held to be error to strike out the answer as sham, where the court decided the question of fact raised by the answer, on a mere inspection of the note. (*Rogers v. Vosburgh*, 87 N. Y. 228). An answer will not be stricken out as sham, if the defendant swears it was put in in good faith, and not for delay, and presents an affidavit of merits. (*Central Bk. v. Thein*, 76 Hun, 571; *Munn v. Barnum*, 12 How. Pr. 563; 1 Abb. Pr. 281). Where the defendant obtained leave of the court to serve an amended answer, which was presented with his motion papers, it will not afterwards be stricken out as sham. (*Mussina v. Stillman*, 13 Abb. Pr. 93). The order should simply strike out the answer (*Potter v. Carreras*, 4 Robt. 629); and the plaintiff may then enter judgment as upon failure to answer. (*DeForest v. Baker*, 1 Abb. Pr. N. S. 34).

ARTICLE X.

IRRELEVANT, REDUNDANT AND SCANDALOUS MATTER.

Irrelevant, redundant, or scandalous matter contained in a pleading, may be stricken out, upon the motion of a person aggrieved thereby. Where scandalous matter is thus stricken out, the attorney whose name is subscribed to the pleading may be directed to pay the costs of the motion, and his failure to pay them may be punished as a contempt of the court. (Co. Civ. Proc. § 545).

This section does not afford a substitute for a demurrer, in so far as a motion to strike out for irrelevancy or redundancy is concerned. (*Walker v. Fowler*, 85 N. Y. 621; *Robbins v. Palmer*, 5 Wk. Dig. 537). An entire count of an answer cannot be stricken out, therefore, as irrelevant or redundant under this section. (*Goodman v. Robb*, 41 Hun, 605). A demurrer would afford no remedy against scandalous pleadings, however, so an entire count may be stricken out if scandalous. (*Armstrong v. Phillips*, 60 Hun, 243). The pleading is irrelevant, when the matter which it sets forth has no bearing upon the dispute in question, does not affect the subject matter or the controversy, and can in no way affect or assist the decision of the court. (*Park & Sons Co. v. Nat. Druggists' Assn.*, 30 App. Div. 508; *Jeffras v. McKillop & Sprague Co.*, 2 Hun, 351). If the matter is proper to be pleaded for any purpose, or if it may affect the question of damages (*Root v. Foster*, 9 How. Pr. 37); or, if it goes in mitigation of the amount of damages, in an action for libel (*Jeffras v. McKillop & Sprague Co.*, 2 Hun, 351); or, if it is material upon the question of costs (*Van Rensselaer v. Brice*, 4 Paige, 174; *Dunkirk v. L. S. & M. S. Ry. Co.*, 75 Hun, 366); it is not irrelevant. The true test of relevancy is to inquire whether the averments tend to constitute a cause of action or defense; if they do, they are not irrelevant. (*Dovan v. Dinsmore*, 33 Barb. 86). "Redundant" and "irrelevant" are not equivalent terms. Matter which is irrelevant is also redundant; but the converse is not true. A needless repetition of material averments is redundancy, although

the facts averred, so far from being irrelevant, may constitute the whole cause of action. (*Bowman v. Sheldon*, 5 Sandf. 657). When matter is attacked as redundant the rule applied will be, that, unless it is clear that no evidence can properly be received under the allegation, it will be retained until the trial. (*Follett v. Jewett*, 11 N. Y. Leg. Obs. 193). Statements of evidence in the pleading are redundant. (*Wooden v. Strick*, 10 How. Pr. 48). The motion to strike out matter as irrelevant or redundant, is addressed to the discretion of the court; and those motions are not to be encouraged. (*Town of Essex v. N. Y. & Canada R. R. Co.*, 8 Hun, 361; *Emmens v. McMillan Co.*, 21 Misc. 638). The discretion of the special term is reviewable, of course. (*Nehresheimer v. Bowe*, 3 Civ. Proc. Rep. 368). Although matter may be clearly redundant, if it does not tend seriously to prejudice the opposite party, or encumber the record, it will not be stricken out. The opposite party is not aggrieved by it. (*Younger v. Duffie*, 26 Hun, 442; *Tradesmen's Nat. Bk. v. U. S. Trust Co.*, 49 App. Div. 362). It is only in those cases in which harm or injustice will be done to the opposite party that a motion to strike out irrelevant allegations should be granted. (*Lugar v. Byrnes*, 1 N. Y. Supp. 262; S. C. 15 N. Y. State Rep. 97). If there may be a remote probability that the matter may, in any way be pertinent, it will be permitted to stand. (*Duprat v. Havemeyer*, 18 Wk. Dig. 439). Scandalous matter is that which contains charges of a criminal nature against a party, prejudicial to the character and reputation of the party, or of any third person. (*Ex parte Simpson*, 15 Ves. 476). Such allegations will never be permitted to remain upon the record; and the court will always consider the opposite party aggrieved by them, and will strike them out either upon his motion, or of its own motion. (*Somers v. Torrey*, 5 Paige, 54; *Carpenter v. West*, 5 How. Pr. 53; *Hilton v. Carr*, 40 App. Div. 490). Any person "aggrieved" by scandalous allegations in a pleading may move under this section to strike out such allegations, although not a party to the action. (*Wehle v. Loewy*, 2 Misc. 345). The court should charge upon the attorney who puts in a pleading

containing scandalous allegations, the costs of the motion. (*McVey v. Contrell*, 8 Hun, 522).

Motions to strike out of any pleading, matter alleged to be irrelevant, redundant or scandalous, and motions to correct a pleading, on the ground of its being so indefinite or uncertain, that the precise meaning or application is not apparent, must be noticed, before demurring or answering the pleading, and within twenty days from the service thereof. The time to make such motion shall not be extended unless notice of application for such extension, stating the time and place thereof, of at least two days, shall be given to the adverse party. (General Rule 22). The motion must be made before noticing the case for trial. (*Kellogg v. Baker*, 15 Abb. Pr. 286). The objection that matter in a pleading is irrelevant or redundant, cannot be made at the trial. (*Smith v. Countryman*, 30 N. Y. 655). If time "to plead or otherwise move" has been extended, the motion may be made before the expiration of the extension. (*Hammond v. Earle*, 5 Abb. N. C. 105). But procuring an extension of time to answer or demur, without reserving leave to make the motion is a waiver of the right. (*Brooks v. Hanchett*, 36 Hun, 70). If the notice of the motion is not served in time under Rule 22 the opposite party must show it. (*Barber v. Bennett*, 4 Sandf. 705). The right to object that the motion is not made within the twenty days is not waived by retaining the notice of motion. (*Gibson v. Gibson*, 68 Hun, 381). The irrelevant and redundant matter should be specified in the notice. (*Blake v. Eldred*, 18 How. Pr. 240; *Rathbun v. Markham*, 43 How. Pr. 271).

ARTICLE XI.

INDEFINITE AND UNCERTAIN ALLEGATIONS.

Where one or more denials or allegations, contained in a pleading, are so indefinite or uncertain that the precise meaning or application thereof is not apparent, the court may require the pleading to be made definite and certain, by amendment. (Co. Civ. Proc. § 546).

The motion provided for by this section takes the place of a demurrer for want of form, under the former practice. (*Rathbun v. Markham*, 43 How. Pr. 271). The object of the motion is simply to correct the form of the pleading. (*People v. Ryder*, 12 N. Y. 433). If the statement is so indefinite that the precise nature of the charge is not apparent, the remedy of the other party to the action is an application under this section. (*Olcott v. Carroll*, 39 N. Y. 436). If there is no indefiniteness or uncertainty in regard to the nature of the charge; or if by an examination of the pleading, the party can see with ordinary certainty the meaning of the different allegations, and the cause of action or defense intended to be set up by them, it is not objectionable under this section. (*Tilton v. Beecher*, 59 N. Y. 176; *Brounell v. National Bank of Gloversville*, 13 Wk. Dig. 371). If the charge or defense is definitely stated, although the statement involves details which are not stated, the proper procedure to procure such details is by an application for a bill of particulars. (*Rouget v. Haight*, 57 Hun, 119). This section is not designed to enable a party to obtain the facts relied on by his opponent as proof, but only to assist him in securing a complete and clear averment of fact. (*Rosenthall v. Rosenthall*, 19 Civ. Proc. Rep. 56). See also, *Singer v. Weber* (44 App. Div. 134). The indefiniteness must appear upon the face of the pleading, and not by extrinsic facts. (*Hopkins v. Hopkins*, 28 Hun, 436). Where the complaint left it uncertain whether the party sought to recover upon an affirmance of a contract, or upon its rescission, he was compelled to make it definite and certain, under

this section. (*Faulk v. Kamp*, 40 Super. 70). In an action to recover property transferred by the plaintiff to the defendant, he was required under this section to state the specific real estate, and the kind and quantity of personal property. (*Brinkerhoff v. Perry*, 59 How. Pr. 156, note). Where the plaintiff alleged that the defendant guaranteed or promised to pay for goods sold to a third person; he was required to make the complaint definite and certain by alleging which of the two contracts defendant made, the two forms of the obligation being entirely different. (*Partridge v. Haley*, 20 Wk. Dig. 320). Where in an action for work, labor and services, the plaintiff alleged that the services were reasonably worth the sum of one thousand dollars, which defendant promised and agreed to pay; it was held that the plaintiff must make his complaint definite and certain, by alleging whether he sought to recover upon a *quantum meruit*, or upon an express contract. (*Gardner v. Locke*, 2 Civ. Proc. Rep. 252). The fact that other allegations in the complaint, which are not attacked by the motion, are sufficient to make out a cause of action, does not deprive the party of the right to have the particular allegations made definite and certain. (*People v. N. Y. Juvenile Guardian Socy.*, 6 Wk. Dig. 136). If the causes of action or defenses are not stated separately, the remedy is by motion under this section. (*Kerr v. Hays*, 35 N. Y. 331; *Blake v. Barnes*, 30 N. Y. St. Rep. 299). Denials cannot be amended under this section. (*Hughes v. Chi. M. & St. P. R. R. Co.*, 45 Super. 114, 122). But where the answer denied each and every allegation in the complaint not hereinbefore specifically admitted or denied, it was held that a motion should be granted under this section to require the pleader to specify the particular allegations which he denied. (*Farnsworth v. Wilson*, 5 Civ. Proc. Rep. 179, note; *Zimmerman v. Meyrowitz*, Scott J., N. Y. Law Journal, 15 Mch. 1901, pp. 2161-2). So, where the answer denied each and every material allegation, the defendant was required to make it definite and certain. (*Mattison v. Smith*, 1 Robt. 706). If the allegations sought to be

corrected are mere surplusage, the motion should be denied (*Davidson v. Seligman*, 51 Super. 47) ; or where the indefinite allegations are in the answer, and respond to irrelevant matter in the complaint, the motion will not be granted. (*Parshall v. Tillou*, 13 How. Pr. 7). The objection that matter in a pleading is indefinite and uncertain under this section, cannot be first taken at the trial. (*Farmers & Cits.' Bank v. Sherman*, 33 N. Y. 69; *Greenfield v. Mass. Mut. L. Ins. Co.*, 47 N. Y. 430, 437). The rules as to when and how the motion must be made under this section are the same as the rules for the motions under section five hundred and forty-five, and are sufficiently stated in article X, *ante*. The order made upon this motion is appealable to the appellate division. (*Brownell v. National Bank of Gloversville*, 13 Wk. Dig. 371). The order to be entered on a determination by the court that a pleading shall be made more definite and certain, should not provide that, in default of the prescribed amendment, the whole pleading should be stricken out, where the removal of the indefinite and uncertain allegations would still leave a cause of action or a defense; the provision should be only for the striking out of the objectionable allegations. (*Cooper v. Fiske*, 44 App. Div. 531).

CHAPTER X.

THE COMPLAINT.

- ARTICLE I....What complaint must contain.
ARTICLE II...Statement of facts.
ARTICLE III...Joinder of causes of action.
ARTICLE IV...Demand of judgment.
ARTICLE V...Service of the complaint.

ARTICLE I.

WHAT COMPLAINT MUST CONTAIN.

SECTION.

1. In general.
2. Caption—Court and county.
3. Caption—Names of parties.

Sec. 1. In General.

The first pleading on the part of the plaintiff is the complaint (Co. Civ. Proc. § 478), which must contain:

1. The title of the action, specifying the name of the court in which it is brought; if it is brought in the supreme court, the name of the county, which the plaintiff designates as the place of trial; and the names of all the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts, constituting each cause of action, without unnecessary repetition.

3. A demand of the judgment to which the plaintiff supposes himself entitled. (Co. Civ. Proc. § 481).

The complaint takes the place, under the code system of pleading, of the plaintiff's declaration in actions at law, and the bill in chancery under the old practice; and the rules concerning the complaint rest, in substance, on the same principles as those regulating these

pleadings. There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions, have been abolished. (Co. Civ. Proc. § 3339). The form and fiction of the old practice is replaced by the substance and truth of the new. The office of the complaint is to apprise the adverse party of the exact cause for which he is sued, where and by whom he is sued, and the judgment demanded; all of which particulars will be hereafter spoken of. For the general rules concerning pleadings see *ante*, chapter IX, articles I and II.

Sec. 2. Caption—Court and County.

Section one hundred and forty-two of the code of procedure read: "The complaint *shall* contain" etc.; and it was held that if the name of the court was inserted in the summons, its omission in the complaint would be disregarded (*Van Namee v. Peopel*, 9 How. Pr. 198); but the word *shall* in this section was changed to *must*, in section four hundred and eighty-one of the code of civil procedure, with the avowed intention of overruling these decisions, and of making compliance with the provisions of this section in this and other respects, an absolute necessity. It is now provided by the code that both the summons and the complaint *must* specify the court in which the action is brought; and if it is brought in the supreme court, the name of the county in which the plaintiff desires the trial (Co. Civ. Proc. § 417), or which the plaintiff designates as the place of trial. (Co. Civ. Proc. § 481). Where the summons was served without a copy of the complaint, and without the name of any court appearing thereon, and a copy of the complaint, was subsequently served, entitled in the supreme court, on motion to set aside the proceedings, it was *held*, that the name of the court sufficiently appeared. (*Walker v. Hubbard*, 4 How. Pr. 154). In actions brought in a local court, which must of necessity be tried in the county in which such court is situated, the statement of the county is of no importance, because the defendant can not fail to know where the trial will be had. Thus a complaint entitled

in the N. Y. Common Pleas sufficiently indicates the place of trial. (*Leopold v. Poppenhiemer*, 1 Co. Rep. 39). It has been held that an omission of the name of the court, from both summons and complaint, is a fatal objection to the pleading, and that it is a nullity (*Ward v. Stringham*, 1 Co. Rep. 118) ; still if it is only omitted from one, and contained in the other, such a defect may be cured by amendment. (*Davison v. Powell*, 13 How. Pr. 287). The place of trial stated in the complaint determines where motions are to be made, as well as where the trial is to be had. (*Merrill v. Grinnel*, 10 How. Pr. 31). Where the complaint fails to specify the name of the court, or the place of trial, it must be either amended or stricken out as defective. (*Hotchkiss v. Crocker*, 15 How. Pr. 336). So the omission of the name of the county from the complaint, is a defect which cannot be cured by being included in the summons. (*Id.*). Advantage is to be taken of a defect in this respect by motion to set aside the complaint as irregular. (*Hall v. Huntley*, 1 Co. Rep. N. S. 21, note). Such a defect is not waived by omitting to raise the objection until after the time to answer has expired, or by obtaining orders extending the time to answer. (*Merrill v. Grinnel*, 10 How. Pr. 31). A motion to amend in this respect may be made in the district where triable, and in the county where the plaintiff or defendant resides. (*Hotchkiss v. Crocker*, 15 How. Pr. 336). If an action be in fact local, by reason of affecting real property, the right of the defendant to have the place of trial fixed accordingly, is not impaired by plaintiff's omitting to aver in the complaint, the situation of the property; but that fact may be shown by affidavit in support of a motion to change the place of trial. (*Acker v. Leland*, 96 N. Y. 383). In an action in the supreme court, if the county designated in the complaint, as the place of trial, is not the proper county, the action may notwithstanding, be tried therein; unless the place of trial is changed to the proper county, upon the demand of the defendant, followed by the consent of the plaintiff, or the order of the court. (Co. Civ. Proc. § 985). But the plaintiff may amend his complaint, within the

time allowed by section five hundred and forty-two of the code for amendments, by inserting the proper county (*Toll v. Cromwell*, 12 How. Pr. 79); and the motion to change the place of trial may be heard in the county designated by the amendment, and may be determined as if no change had been made (*Moulton v. Beecher*, 1 Abb. N. C. 193); but for the purpose of hearing a motion to set aside, or appeal from, an order changing the place of trial, it is deemed unchanged. (Co. Civ. Proc. § 989).

Sec. 3. Caption—Names of Parties.

Under the former code, it was held that though properly all the parties should be named in the title, yet, if only a portion were there set forth, but all were named in the body of the complaint, it was sufficient (*Hill v. Thacter*, 3 How. Pr. 407); but section four hundred and eighty-one of the code of civil procedure requires that the title of the action must specify the names of all the parties to the action, plaintiff and defendant. If these names are all correctly set forth in the title of the cause, it is unnecessary to repeat them (*Stanley v. Chappell*, 8 Cow. 235); and if the parties are once correctly stated, they may afterwards be designated "the plaintiff" or "the defendant." (Id.). In an action by or against a partnership, the full names of all the partners must be stated (*Bentley v. Smith*, 3 Cai. 170); but in an action against a partnership doing business as common carrier, objection cannot be taken by a person properly made a defendant, on the ground that the plaintiff had failed to join with him a person jointly engaged with him in that business, unless the persons so engaged shall, at least thirty days before the commencement of the action, have filed in the clerk's office of the county, in which they transact such business, a statement showing the names of all of them. (Co. Civ. Proc. § 1945). If the defendant is known by two names, he may be sued by either (*Eagleston v. Son*, 5 Robt. 640), or by that by which he is generally known, though not his real one. (*Cooper v. Burr*, 45 Barb. 9). Where under section four hundred and fifty-one of the code of

civil procedure, a defendant has been designated by a fictitious name, there must be an allegation in the complaint that the real name is unknown. (*Gardner v. Kraft*, 52 How. Pr. 499). If the cause of action is in favor of the plaintiff in a representative capacity or character, or is against a defendant in a similar character, this fact should be clearly indicated, either in the caption or the body of the complaint (*Smith v. Levinus*, 8 N. Y. 472; *Root v. Price*, 22 How. Pr. 372); but if it appear in the body of the pleading, it is sufficient, though it does not appear in the title. (*Cordier v. Thompson*, 8 Daly, 172). The representative character of the party suing or sued is designated by the use of the word "as" or its equivalent. (*Stilwell v. Carpenter*, 62 N. Y. 639). If the words denoting such representative capacity are added directly to the name of the party, they will be regarded as mere *descriptio personæ*, (*Hallet v. Harrower*, 33 Barb. 537). If the representative character of the plaintiff is plainly disclosed in the body of the complaint, the omission of the word "as" in the caption is not held conclusive (*Beers v. Shannon*, 73 N. Y. 292); and in *Marshall v. Bresler* (1 How. Pr. N. S. 217), it was held that the representative character of the plaintiff was sufficiently indicated, although the word "as" was not inserted before the word administrator; but in the case of *Bennett v. Whitney*, (94 N. Y. 302), it was held, that while the omission of the word "as" in the title of the action is not conclusive, when the body of the complaint plainly discloses an official or representative capacity as the ground of action; yet, where its scope and averments harmonize with the omission, the action will be considered as against the defendants individually. Where a party is not named in the title of the action, but in the body of the complaint, and it is stated that he is made a party defendant because he refuses to join as plaintiff, and how he is interested in the action, the remedy of defendants is not by demurrer for misjoinder, but by motion to set aside or strike out the complaint. (*Swift v. Smith*, 4 Law. Bull. 87). A mere misnomer is a formal error which may be amended before or at the trial, or after-

wards (*Barnes v. Perine*, 12 N. Y. 18) ; and will be disregarded on appeal (*Bank of Havana v. Magee*, 20 N. Y. 355) ; and a defendant sued by a wrong name can not move to set aside the proceedings, but advantage of such error must be taken by answer. (*Traver v. Eighth Ave. R. R. Co.*, 6 Abb. Pr. N. S. 46). If the complaint differs from the summons as to the parties, it is the complaint which is irregular (*Tuttle v. Smith*, 14 How. Pr. 395) ; and not the summons. (*Allen v. Allen*, Id. 248).

ARTICLE II.

STATEMENT OF FACTS.

SECTION.

1. What facts to be stated.
2. What should not be stated.
3. How facts to be stated.
4. What facts to be stated in certain cases.

Sec. 1. What Facts to be Stated.

The code of civil procedure (§ 481, Subd. 2) requires the complaint to contain a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition. Where a complaint sets forth two or more causes of action, the statement of facts constituting each cause of action must be separately stated and numbered. (Co. Civ. Proc. § 483). The very object of the code system of pleading, is to enable the court to give judgment according to the facts stated and proved, without reference to the forms used, or to the legal conclusions adopted by the pleader. (*Wright v. Hooker*, 10 N. Y. 51). All pleadings should now be literally and absolutely true (*People v. McCumber*, 18 N. Y. 315, 323) ; and as there can be only one substantially true statement of a single cause of action the practice of setting it forth in different counts is necessarily abolished (*Nash v. McCauley*, 9 Abb. Pr. 159), and where it is so set forth, a motion to compel the plaintiff to elect on which one he will rely, should be granted (*Roberts v. Leslie*, 46 Super. 76; *Fern v. Vanderbilt*, 13 Abb. Pr. 72) ; unless it can be seen that, in consequence of a possible variance between the pleading and the proof, it is

necessary to permit the statement of one cause of action in several counts. (*Blank v. Hartshorn*, 37 Hun, 101). It is not a case for demurrer. (*Comstock v. Hoeft*, 1 Law Bull. 43). But the court will not compel the plaintiff to elect between several causes of action properly pleaded, although it may be probable that on the trial but one cause of action will be presented. (*Smith v. Douglass*, 15 Abb. Pr. 266; *Jones v. Palmer*, 1 Abb. Pr. 442). The complaint should state every fact which plaintiff must prove to enable him to maintain his suit, and which defendant has a right to controvert or answer (*Allen v. Patterson*, 7 N. Y. 476); and it is enough for the pleader to state facts as they exist, from which the court may draw the proper legal conclusions. (*Haight v. Child*, 34 Barb. 186). The facts required to be stated are physical facts, capable of being established as such by evidence, and from which, when so established, the right to maintain the action or the validity of the defense is a conclusion of law, to be drawn by the court. (*Lawrence v. Wright*, 2 Duer, 673, 675). Where from facts stated in the complaint, a material fact, not stated in it, is plainly inferable, the complaint ought not to be dismissed at the trial for insufficiency. (*Leon v. Bernheimer*, 10 Wk. Dig. 288). Thus an allegation of revocation of authority to make an award, was held good without alleging notice of the revocation, because notice was implied in the words "revoked the authority;" there could be no revocation unless there was notice. (*Frets v. Frets*, 1 Cow. 335). So an averment of acceptance, implies that it was in writing. (*Bank of Lowville v. Edwards*, 11 How. Pr. 216). Where a cause of action is local, or where it is brought in a local or inferior court, the complaint should state facts showing or conferring jurisdiction. (*Frees v. Ford*, 6 N. Y. 176). So where no question is raised at the trial, it will be presumed on appeal from such a court, that the court had jurisdiction, unless it appear from the record to have been legally impossible. (*Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263). Whatever may be necessary to prevent surprise at the trial, or to protect the parties from injustice or fraud, should be stated. But plead-

ings are not required to give all the details of the transactions to which they relate; if they clearly apprise the parties of the precise nature and extent of the charge, and enable them to prepare for trial, nothing more can be required. (*Sloman v. Schmidt*, 8 Abb. Pr. 5).

Sec. 2. What Should not be Stated.

None but material and issuable facts should be pleaded (*Williams v. Hayes*, 5 How. Pr. 470); and where other facts are pleaded, the remedy of the adverse party is by motion to strike them out; so that the record shall present nothing but the issuable facts in the case. (*Id.*). One should never state facts by way of avoiding an attempted defense. The fundamental provision of the code, that the complaint must state the facts only that constitute the cause of action, involves this rule; it is therefore sufficient if the plaintiff state those facts only which constitute his cause of action, and not anticipate or negative a possible defense of the adversary (*Sands v. St. John*, 23 How. Pr. 140), as by alleging facts or circumstances to avoid the statute of limitations. (*Id.*; *Butler v. Mason*, 5 Abb. Pr. 40). Where by statute, or by the code, it is expressly declared what shall be a sufficient pleading in any particular cause of action or fact, it is unnecessary to plead any further or additional facts. (See *ante*, Chap. IX, Art. 1, section 5, where this subject is treated in reference to all pleadings).

Sec. 3. How Facts to be Stated.

Subdivision two of section four hundred and eighty-one of the code of civil procedure provides that there must be a plain and concise statement of the facts constituting each cause of action without unnecessary repetition. It would seem that this alone would be sufficient to indicate how facts should be pleaded; but some reference to authority may be useful. Care should be taken as to how facts are stated, because the same facts differently set forth may constitute different causes of action, and a skillful adaptation of the facts, so as to con-

stitute this or that cause of action, may determine the right to recover. (*Van Leuven v. Lyke*, 1 N. Y. 515). Thus, when an infant hired a horse to go a fixed distance, and wrongfully went further, in an action of tort, infancy would be no defense. (*Fish v. Ferris*, 5 Duer, 49). In *Walter v. Bennett* (16 N. Y. 250) the plaintiff complained as for tort, and on the trial he proved a cause of action on contract, and it was held a failure of proof, and he was non-suited; the court saying that the form of the plaintiff's action was *ex delicto*, and he must prove that the defendant committed a wrong. The rule is settled that when the complaint states a cause of action for tort, it cannot, on the trial, be converted into one on contract. (*Neudecker v. Kohlberg*, 81 N. Y. 296). For the rules covering amendments at the trial see *ante*, Chap. 9 Art. 7. Where the complaint states two causes of action, one good and one bad, the latter does not invalidate the complaint, but may be treated as surplusage. (*Boyle v. City of Brooklyn*, 71 N. Y. 1). Allegations in a complaint should be consistent with each other; and so it is the established rule of pleading, that only such causes of action can be united in the same complaint as are consistent with each other. (*Henderson v. Jackson*, 40 How. Pr. 168; Co. Civ. Proc. § 484). A complaint may, however, state several grounds or reasons for the relief demanded, or where there is some uncertainty as to the exact ground of recovery, may so be framed as to meet the contingency of the trial. (*Talcott v. Van Vechten*, 25 Hun, 565; *Velic v. Newark City Ins. Co.*, 65 How. Pr. 1; *Pittsfield Bank v. Tailer*, 60 Hun, 130). Where a party appears to have a good cause of action, he will not be turned out of court simply because the pleader has stated it in an inartificial manner, or has joined several different causes of action, in one count, unless the objection thereto is specifically raised. (*Wetmore v. Porter*, 92 N. Y. 76). No greater particularity is required than the nature of the thing pleaded will conveniently admit; and less particularity is required, when the facts lie more in the knowledge of the opposite party

than of the party pleading. (*Nellis v. DeForest*, 16 Barb. 61). Thus a policy of insurance in the possession of the opposite party, may be described in a general way. (*Id.*).

Sec. 4. What Facts to be Stated in Certain Cases.

The necessary and essential allegations in the various actions are not properly a part of this work; they belong to the substantive, rather than the adjective, branch of the law. It is to be borne in mind, of course, that every variety of action requires certain allegations, but what these are does not come within the province of a treatise on practice.

There are code provisions directing certain allegations in certain actions, which, though no logical part of this work, it may be well to mention cursorily. Certain provisions covering pleading in general have been dealt with in Chap. 9, Art. 1, Sec. 5, *ante*, and these will not be repeated here.

In an action to compel the determination of a claim to real property, the requisite allegations are prescribed by section 1639 of the code of civil procedure. The action is statutory and the necessary averments are, therefore, prescribed.

In an action brought by or against a corporation, the complaint must aver that the plaintiff or defendant, as the case may be, is a corporation; must state whether it is a domestic corporation or a foreign corporation; and if the latter, the state, country or government, by or under whose laws it was created. (Co. Civ. Proc. § 1775). A complaint which fails to conform to the provisions of this section is not demurrable (*Harmon v. Vanderbilt Hotel Co.*, 79 Hun, 392; *affd.* without op., 143 N. Y. 665); and such a complaint will sustain a judgment in favor of the plaintiff. (*Ochs v. Frey*, 47 App. Div. 390). The remedy for such defects in a complaint is by motion. (*Harmon v. Vanderbilt Hotel Co.*, *supra*).

In an action by a creditor against his deceased debtor's heir, or devisee, to recover the debt, certain essen-

tial allegations are prescribed. (Co. Civ. Proc. §§ 1845, 1851).

The complaint, in an action for dower and in an action of ejectment must describe the property with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there is any, or in some other appropriate manner. (Co. Civ. Proc. §§ 1606, 1511). In an action for dower, the complaint must also set forth the name of the plaintiff's husband. (Co. Civ. Proc. § 1606).

The complaint in an action to foreclose a mortgage upon real property must state, whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part thereof has been collected. (Co. Civ. Proc. § 1629).

In an action for partition, the complaint must describe the property with common certainty, and must specify the rights, shares, and interests therein of all the parties, as far as the same are known to the plaintiff. If a party, or the share, right, or interest of a party, is unknown to the plaintiff; or if a share, right, or interest is uncertain or contingent; or if the ownership of the inheritance depends upon an executory devise; or if a remainder is a contingent remainder, so that the party cannot be named; that fact must also be stated in the complaint. (Co. Civ. Proc. § 1542).

In an action of replevin the code of civil procedure provides the manner of alleging certain essential facts. See sections 1720, 1721.

Where an action is brought for a separation, the complaint must specify particularly the nature and circumstances of the defendant's misconduct, and must set forth the time and place of each act complained of, with reasonable certainty. (Co. Civ. Proc. § 1764).

In every instance, however, the code must be carefully searched to unearth provisions of substantive law covering contemplated actions. There are many such adroitly concealed among provisions dealing solely with practice.

ARTICLE III.

JOINDER OF CAUSES OF ACTION.

SECTION.

1. What is a single cause of action.
2. What causes of action may be joined.
3. What causes of action may not be joined.
4. How objection of misjoinder taken.

Sec. 1. What is a Single Cause of Action.

The plaintiff may unite, in the same complaint, two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

1. Upon contract, express or implied.
2. For personal injuries, except libel, slander, criminal conversation, or seduction.
3. For libel or slander.
4. For injuries to real property.
5. Real property, in ejectment, with or without damages for the withholding thereof.
6. For injuries to personal property.
7. Chattels, with or without damages for the taking or detention thereof.
8. Upon claims against a trustee, by virtue of a contract, or by operation of law.
9. Upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.
10. For penalties incurred under the fisheries, game and forest law.

But it must appear, upon the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint that they do not require different places of trial. (Co. Civ. Proc. § 484).

This section is a substitute for so much of the code of procedure (§ 167) as relates to the joinder of causes of action. The amendments in the different subdivisions are of minor importance; their chief object is to remove obscurities of expression in the original.

It will first be necessary to determine what constitutes a single cause of action. The distinction usually made between demands or rights of action, which are single and entire, and those which are several and distinct, is that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. (*Secor v. Sturgis*, 16 N. Y. 548). In the case of *Welch v. Platt* (32 Hun, 194; S. C., 5 Civ. Proc. Rep. 433), where the complaint set forth a usurious loan of money, the execution and delivery of a chattel mortgage to secure the loan, and alleged that it was void on that ground, and asked that it be surrendered and canceled; and also alleged that the plaintiff was the owner of certain chattels included in the mortgage, and that the defendant without process of law, wrongfully took the same from the plaintiff, and unjustly detained them to the plaintiff's damage; it was held that it presented but one cause of action; viz: for the taking and conversion of the property; that the statements regarding the loan and the chattel mortgage were legally no more than alleging that the plaintiff was the owner of the property, for the taking and conversion of which the action was brought. And although the different allegations were separately stated and numbered, the judge says, that notwithstanding this division, but a single cause of action was set forth in the complaint. So in the case of *Lattin v. McCarty* (41 N. Y. 107), where the plaintiff prayed for, 1, possession; and 2, a conveyance of the defendant's apparent title by quit-claim, or otherwise, etc., and that the defendant be forever barred from setting up or asserting his pretended title; Hunt, C. J., says, that the complaint contains but a single cause of action; to wit, for relief against the deed under which defendant fraudulently obtained possession. It is quite true that while the purpose of the complaint is single, it seeks to

accomplish that result by several operations; it seeks to have a fraudulent deed set aside, and when that is done, it will follow that the plaintiff shall be awarded the possession of the property. The first is a means simply of obtaining the second. One is the cause of action, and the other is the fruit of the action. As to what facts have been held to constitute but one cause of action see the cases of *Krower v. Reynolds* (99 N. Y. 245); *Tuers v. Tuers* (100 N. Y. 196); *Bebinger v. Sweet*, (1 Abb. N. C. 263). In the case of torts, each trespass, or conversion, or fraud gives a right of action, and but a single one, however numerous the items of wrong or damage may be. (*W. T. Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 42). So, where the plaintiff alleged that the defendant assaulted the plaintiff, dragged him violently through the public streets, imprisoned him in the custody of the sheriff, and restrained him of his liberty without probable or reasonable cause, whereby he was wounded and injured in credit and in other business; it constitutes but one cause of action. (*Sheldon v. Lake*, 9 Abb. Pr. N. S. 306). If there is but one right to be enforced or one wrong to be redressed, there can be but one cause of action, however many steps are necessary to enforce such rights, or to redress such wrong. (*Meyer v. Van Collem*, 7 Abb. Pr. 222). Moreover if there is but one right and that right is in the plaintiff as an executor or administrator, a complaint seeking to enforce the right is not demurrable if the action is entitled as by the plaintiff individually and as executor. (*Moss v. Cohen*, 158 N. Y. 240). A complaint which alleges an assault upon the plaintiff and a trespass upon his premises at the same time sets up but one cause of action. (*Gilbert v. Pritchard*, 41 Hun, 46). The same rule is true also, of actions on contracts. (*Secor v. Sturgis*, 16 N. Y. 548). So, in a running account it is held that all of the items due at the time of the action constitute but a single cause of action; and that the recovery in one action for a part of the items, is a bar to a subsequent action for the residue. (*Stevens v. Lockwood*, 13 Wend. 644). But where several notes have been given in settlement of

such running account, a separate action may be brought on each note. (*Nathans v. Hope*, 77 N. Y. 420). The contract of an attorney with his client to prosecute or defend a suit is entire, and he must include all his services in one action. (*Bathgate v. Haskin*, 59 N. Y. 533). The law forbids the splitting up of a single cause of action, in order to prevent vexatious or oppressive litigation. (*Perry v. Dickerson*, 85 N. Y. 345). But where the parties agree to a division of a single demand, the reason for the rule ceases. (*O'Bierne v. Lloyd*, 43 N. Y. 248). A party cannot be compelled to join in one action several distinct causes of action. (*Secor v. Sturgis*, 16 N. Y. 548). The assertion may be ventured that a considerable divergence of judicial opinion will be found on the question as to what constitutes a single cause of action.

Sec. 2. What Causes of Action may be Joined.

Section four hundred and eighty-four of the code of civil procedure expressly provides, that whether causes of action are such as were formerly denominated legal or equitable, or both, they may be united in the same complaint. All the causes of action must be consistent with each other. The complaint in this respect differs from the answer, in that the answer may allege a defense upon distinct, and even inconsistent grounds. (*Goodwin v. Wertheimer*, 99 N. Y. 149). The section also requires, that it must appear on the face of the complaint, that all the causes united belong to one of the subdivisions of the section; that they do not require different places of trial; that they affect all the parties to the action, except as otherwise prescribed by law (subd. 9); but it has been held under this subdivision, that causes of action, belonging to different subdivisions of the section, may be united in the same complaint, if they arise out of the same transaction; and that subdivision 9 was broad enough to embrace more than one cause of action, and also causes of action belonging to different subdivisions of that section. (*Polley v. Wilkison*, 5 Civ. Pro. Rep. 135). Subdivision 10, however, is not to be included in this statement of the rule. That

subdivision was added by chapter 590, of the laws of 1900, and it was very shortly determined that a cause of action for injuries to real property under subdivision 4 and for penalties under subdivision 10 could not be joined although arising out of the same transaction. (*People v. Wells*, 52 App. Div. 583). The causes of action must be in favor of all the plaintiffs, and against all the defendants, and belong to the same class (*Enos v. Thomas*, 4 How. Pr. 48); but defendants need not be all equally affected. (*Earle v. Scott*, 50 How. Pr. 506). Demand for legal and equitable relief when consistent, may be joined (*Getty v. Hudson Riv. R. R. Co.*, 6 How. Pr. 269); as to have a contract reformed, and enforced as reformed (*Gooding v. McAlister*, 9 How. Pr. 123); but it is not compulsory to join legal and equitable causes of action, when they arise out of the same transaction, or connected with the subject of the action. (*Bruce v. Kelly*, 5 Hun, 229). By the joinder of legal and equitable causes of action, however, the defendant cannot be deprived of a jury trial as to the legal causes of action. (*Van Deventer v. Van Deventer*, 32 App. Div. 578). Where a judgment creditor, in an action against other creditors of his judgment debtor, demands judgment in his complaint that the liens of certain of the defendants be set aside as fraudulent, and also demands enforced foreclosure of a valid chattel mortgage held by another defendant, and the application of the surplus to the payment of the plaintiff's claim; it is held that the causes of action do not affect all the parties to the action and consequently they are not capable of joinder. (*Higgins v. Crichton*, 2 Civ. Pro. Rep. 317; affd. 98 N. Y. 626).

1. Causes of action arising out of a contract, express or implied, and affecting all the parties may clearly be joined. (Co. Civ. Proc. § 484, subd. 1; *Gridley v. Gridley*, 24 N. Y. 130). So, it was held, on demurrer for misjoinder of causes of action, that the creditor holding a joint judgment against debtors entitled to separate legacies under the same will, might properly join them as defendants in one action to reach said property. (*Bradner v. Holland*, 33 Hun, 288). Where one count

was for money loaned, another for services, and a third alleged fraud in inducing the payment of the money and the rendering of the services; it was held that there was no misjoinder; the allegations of fraud merely showed the right to rescind. (*Campbell v. Wright*, 21 How. Pr. 9). An action to recover money paid on a contract repudiated by the plaintiff for fraud, and one for money paid, on the ground that the defendant had refused to perform, may be united. (*Freer v. Denton*, 61 N. Y. 492).

2. Causes of action for personal injuries (except libel, slander, criminal conversation, or seduction) may be joined in one complaint. (Co. Civ. Proc. § 484, subd. 2). So, it was held that a cause of action for false imprisonment and one for malicious prosecution, both arising out of the same transaction, may be alleged in the same complaint in different counts. (*Barr v. Shaw*, 10 Hun, 580; *Marks v. Townsend*, 97 N. Y. 590). In the case of *Nebenzahl v. Townsend* (61 How. Pr. 353), it was held, that where these two causes of action are joined in a complaint, the plaintiff should be compelled to elect upon which cause of action he will proceed; but in the case of *Haight v. Webster* (18 Wk. Dig. 108), it was decided that an action for false imprisonment, and one for malicious prosecution may be united in the same complaint, and tried together. The later cases seem to have firmly established the proposition that these two actions may be joined. (*Thorp v. Carvalho*, 14 Misc. 554). Criminal conversation or seduction cannot be joined under subdivision 2, with other causes of action for personal injuries, nor can injuries to the person be joined with injuries to property. (*Dodge v. Colby*, 37 Hun, 515; reversed on ground that demurrer did not specify this improper joinder, 108 N. Y. 445, 452).

3. Actions for libel or slander may be united in the same complaint (Co. Civ. Proc. § 484, subd. 3); but an action of libel or slander cannot be united with one for personal injuries. (*Perroteau v. Johnson*, 4 Law Bull. 25). So a cause of action for slander and one for false imprisonment cannot be joined. (*DeWolfe v. Abraham*, 151 N. Y. 186). Where the plaintiff alleged facts which would, if established, have sustained an action for assault

and battery, and also facts which would have sustained an action of slander; on demurrer, it was held that two causes of action were improperly united in the complaint (*Anderson v. Hill*, 53 Barb. 238); and the case of *Brewer v. Temple* (15 How. Pr. 286), to the contrary, was overruled. In libel, all who concur in its publication may be sued together; but in slander every speaker must be sued separately. (*Forsyth v. Edmiston*, 2 Abb. Pr. 430). Where a libel is against partners, all the partners may sue together. (*Taylor v. Church*, 8 N. Y. 452).

4. Causes of action for injuries to real property may be joined in one complaint. (Co. Civ. Proc. § 484, subd. 4). So trespass *de bonis asportatis* could always, as a separate cause of action, be joined with trespass *quare clausum fregit* (*Lovett v. Pell*, 22 Wend. 369); and are joined under the code system of pleading. (*Colton v. Jones*, 7 Robt. 164).

5. Causes of action brought to recover real property in ejectment, with or without damages for the withholding thereof, may be joined in one complaint. (Co. Civ. Proc. § 484, subd. 5). In an action of ejectment against several defendants, where the complaint alleges that the defendants are in possession, and also states, in a distinct allegation, that one of the defendants is in possession of a part of the property, under the other defendants; the complaint is not demurrable for misjoinder of causes of action. (*Rank v. Levinus*, 5 Civ. Proc. Rep. 368). In an action to recover real property, or the possession thereof, the plaintiff may demand in his complaint, and in a proper case recover damages, for withholding the property. (Co. Civ. Proc. § 1496; *Compton v. "The Chelsea,"* 139 N. Y. 538). It was formerly held that rents and profits were distinct from damages for withholding (*Larned v. Hudson*, 57 N. Y. 151); but the code provides that the damages in ejectment include the rents and profits, or the value of the use and occupation of the property, where either can legally be recovered by the plaintiff. (Co. Civ. Proc. § 1497). So, an action for recovery of dower, and one for damages for the withholding, may be joined. (*Van Name v. Van Name*, 23

How. Pr. 247). A claim in ejectment may be joined with an action to set aside a deed as fraudulent, and both legal and equitable relief demanded. (*Lattin v. McCarty*, 41 N. Y. 107). It seems that actions at law and in equity, for relief against a conveyance under which defendants claim, may be joined. (*McTeague v. Coulter*, 38 Super. 208). So a party may set forth a cause of action for a specific performance of a contract to convey land, and also a cause of action for damages for a breach of the contract, if for any reason it cannot be performed; and if it turns out that the equitable relief cannot be granted, he may recover his damages, if he is entitled to any. (*Margraf v. Muir*, 57 N. Y. 155). In an action to set aside a conveyance, a claim for rents received by the grantee may be joined. (*Coleman v. Phelps*, 57 How. Pr. 393). A joinder of actions for a partition of real and personal property is permissible. (*Prentice v. Janssen*, 7 Hun, 86).

6. The plaintiff may unite two or more causes of action for injuries to personal property (Co. Civ. Proc. § 484, subd. 6); as a cause of action for injuries to a horse by excessive driving, and a count for the conversion of the horse. (*Summerville v. Metcalf*, 15 Wk. Dig. 154). A cause of action that the defendant, by false and fraudulent representations, had induced plaintiff to sign a bond for the payment of money, secured by a mortgage on plaintiff's real estate, which at defendant's request were made to a third person, to whom defendant delivered them, receiving the specified sum therefor, may be joined with a cause of action for the conversion of the plaintiff's property, by the defendant. Both causes of action are for an injury to personal property. (*DeSilver v. Holden*, 50 Super. 236). Causes of action for deceit in the sale of a canal boat and horses, and for wrongfully taking property from the boat, being both for injuries to the right of property, may be joined. (*Cleveland v. Barrows*, 59 Barb. 364).

7. Causes of action to recover chattels, with or without damages for the taking or detention thereof, may be joined in one complaint. (Co. Civ. Proc. § 484, subd. 7). Nothing in title 2, of chapter 14, of the code of civil

procedure, in regard to actions relating to chattels, is to be so construed as to prevent the plaintiff from uniting in the same complaint, two or more causes of action, in any case specified in section four hundred and eighty-four. (Co. Civ. Proc. § 1689). Counts for detention, and for wrongful injury to plaintiff's property while in the sheriff's possession, may be joined in the same complaint against the sheriff. (*Smith v. Orser*, 42 N. Y. 132). But, in order to entitle him to recover damages for the taking or detention of the property, he must set forth the facts in his complaint, and demand judgment for damages accordingly. (Co. Civ. Proc. § 1722).

8. Two or more causes of action, to recover upon claims against a trustee, by virtue of a contract, or by operation of law, may be joined in one complaint. (Co. Civ. Proc. § 484, subd. 8). Thus, two causes of action, arising out of a breach of trust by a testator, may be united in an action against his executor, brought by the surviving trustee (*Price v. Brown*, 10 Abb. N. C. 67); but a cause of action against an executor, for the collection of assets which had come to his hands, cannot be joined with one for an accounting and a construction of the will. (*Petrie v. Petrie*, 7 Lans. 90). Although all the defendants be not jointly connected with every act of the breach of trust, alleged in the complaint, yet if there is a series of acts on their part, produced by the same fraudulent intent which contributed to the injury of the plaintiffs, and the statements are not made as separate and distinct causes of action against the several defendants, a cause of action is alleged by which they are all affected, and in respect to which they are necessary parties, the several matters may be joined in one complaint. (*Garner v. Harmony Mills*, 6 Abb. N. C. 212). A cause of action against a trustee of an insolvent bank for making improper investments cannot be united with a cause of action on the bond given by him to assist in making up a deficiency in the assets of the bank. (*French v. Salter*, 7 Hun, 546). An action against defendants individually, because as trustees they failed to make the return required by law, and for

their liability as stockholders to a laborer employed by the company, may be joined in one complaint (*Sterne v. Herman*, 11 Abb. N. S. 376); but it is held that a claim against a stockholder because of failure to file certificate of payment of capital stock cannot be united with one against him for the same debt as trustee for failure to file the annual report. One is on contract, and the other for a penalty. (*Wiles v. Suydam*, 64 N. Y. 173). A cause of action against a trustee for not filing a report may be joined with one for a false report, where both affect the same parties. Both are in the nature of a penalty (*Bonnell v. Wheeler*, 1 Hun, 332); but each cause of action must affect all the parties to the action. (*Bonnell v. Griswold*, 68 N. Y. 294). For an omission to file a report, all the trustees are liable; for making a false report and filing it, only those who do the act are liable. Where executors continued to occupy premises formerly occupied by their testator, it was held that in an action against them, in their representative capacity, there might be joined a demand for rent, which accrued in the lifetime of the testator, with rent subsequently accruing. (*Pugsley v. Aikin*, 11 N. Y. 494).

9. Causes of action to recover upon claims, arising out of the same transaction, or transactions connected with the same subject of action, and not included in one of the foregoing subdivisions of section four hundred and eighty-four of the code of civil procedure, may be joined in the same complaint. It is impracticable to lay down a general rule, which will serve as an accurate guide to determine when claims arise out of the same transaction, or transactions connected with the same subject of action. The courts will pass upon each case as it is presented. (*Wiles v. Suydam*, 64 N. Y. 173, 177). It is to be borne in mind that two causes of action originating at the same time may have arisen as a matter of law out of different transactions. (*DeWolfe v. Abraham*, 151 N. Y. 186). Where different persons are interested in an account, although not in the same right, they may and in most cases should all be joined. (*Littell v. Sayre*, 7 Hun, 485). An action for trespass

upon land may be joined with an action for conversion of personal property, where they both arise out of the same transaction. (*Polley v. Wilkisson*, 5 Civ. Proc. Rep. 135). So an action for an injunction restraining the maintenance of a railroad in the street may be joined with one for damages for personal injuries suffered on a particular occasion from the same wrongful use and appropriation of a highway. (*Lamming v. Galusha*, 135 N. Y. 239). Separate causes of action, arising out of a breach of contract and injuries to property, the subject of the contract, entrusted to another, to enable him to perform it, may be properly joined as arising out of one transaction (*Badger v. Benedict*, 4 Abb. Pr. 176; *affd.* 1 Hilt, 414); and where injuries have resulted both to the person and to the property, from an act of negligence on the part of the defendant, both causes of action may be united in the same complaint. (*Howe v. Peckham*, 10 Barb. 656). It was held in *Robinson v. Flint* (16 How. Pr. 240), that an action in tort, and a cause of action on contract, or for a breach of contract, may be united in one action, where the causes of action arose out of the same transaction. In the case last cited it is said that, by "transaction" is to be understood the whole proceedings, commencing with the negotiations, and ending with the performance of the contract, where the matter in controversy arises out of a contract. If the causes of action do not arise out of the same transaction, or transactions connected with the same subject of action, then causes of action *ex contractu* cannot in general be united with causes of action *ex delicto*. (*Keep v. Kaufman*, 56 N. Y. 332); and, though they arise out of the same transaction, they cannot be joined if inconsistent. (*McClure v. Wilson*, 13 App. Div. 274). There seems to be no inherent impossibility in an action on tort and one in contract arising out of the same transaction. A claim for damages, for loss or conversion of goods by a carrier, and to recover an excess of freight paid on the supposition that all the goods had been delivered, may be joined in one complaint. (*Adams v. Bissell*, 28 Barb. 382). An action based on the ownership of money, lost by another

in gaming, and one based on an assignment from the loser of his statutory cause of action, may be united. (*Cassidy v. Daly*, 11 Wk. Dig. 222). In an action to set aside a conveyance as fraudulent, a cause of action against joint debtors and partners may be united with one for the individual fraud of the defendants. (*Royer Wheel Co. v. Fielding*, 61 How. Pr. 437; *affd.* 31 Hun, 274; reversed on another point, 101 N. Y. 504). A count for fraud and deceit, and a count for money had and received by means of such fraud and deceit, may be united in the same complaint; the liability arising out of the same transactions. (*Woodbury v. Deloss*, 65 Barb. 501). A cause of action for having caused plaintiff's ancestor to make a will by fraud and duress, may be joined with one for having by false representations, induced the plaintiff to waive objections to the probate of the will, as the subject of both is the disherison of the plaintiff. (*Hay v. Hay*, 13 Hun, 315). So a cause of action for loss of services by seduction may be joined with one to set aside a release of such cause of action on the ground that it was obtained by fraud. (*Jackson v. Brown*, 74 Hun, 25). A complaint in an action to have a receiver appointed of the rents of the real property of which the defendant was the life tenant and the plaintiff the remainderman, alleged as a first cause of action the receipt of the rents by the defendant and the non-payment of taxes, and as a second cause of action the breach of an agreement by the defendant to pay the plaintiff a certain proportion of the expenses of probating the will of their common testator; upon demurrer for misjoinder the complaint was held good. (*Corcoran v. Mannering*, 10 App. Div. 516). It was held proper to join the officer and his sureties, in an action alleging that the officer took sufficient goods on plaintiff's execution to satisfy it, and that he has failed to make a return, and is withholding the money after the return day. (*Moore v. Smith*, 10 How. Pr. 361). It is proper to unite in one action, claims to recover moneys paid on several separate purchases of lottery tickets. (*Grover v. Morris*, 73 N. Y. 473). A cause of action as executrix may be joined with one as devisee,

where both accrued under a contract made by the testator with defendant, growing out of the same matters. (*Armstrong v. Hall*, 17 How. Pr. 76). It was held before the enactment of section 1815 of the code of civil procedure that an action against an executor or administrator as such could not be joined with one against the same person in an individual capacity (*Clark v. Coles*, 50 How. Pr. 178), but this section has changed the rule. It provides that an action may be brought against an executor or administrator, personally, and also in his representative capacity in either of the following cases:

1. Where the complaint sets forth a cause of action against him in both capacities, or states facts, which render it uncertain, in which capacity the cause of action exists against him.

2. Where the complaint sets forth two or more causes of action against the defendant, in different capacities, all of which grow out of the same transaction, or transactions connected with the same subject of action; do not require different places or modes of trial; and are not inconsistent with each other. For an application of this section, see *DeCrano v. Moore*, (50 App. Div. 361). Two or more persons, severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon an instrument, or by a party thereto to recover against other parties liable over to him; may, all or any of them, be included as defendants in the same action, at the option of the plaintiff. (Co. Civ. Proc. § 454). The liability must be, of course, upon the same written instrument to be within the provisions of this section. (*Carman v. Plass*, 23 N. Y. 286; *Roehr v. Liebmann*, 9 App. Div. 247). This section refers only to written instruments upon which the parties are severally liable for the whole amount and does not apply to a policy of marine insurance which by its terms binds its numerous underwriters severally and not jointly each one for his own part of the whole amount of insurance. (*Straus v. Hoadley*, 23 App. Div. 360).

Sec. 3. What Causes of Action may not be Joined.

Where the causes of action do not belong to one of the subdivisions of section four hundred and eighty-four, or where they are not consistent with each other, or do not affect all the parties to the action, or where the different causes require different places of trial, they cannot be united in the same complaint. (Co. Civ. Proc. § 484). The plaintiff can only join in one action, two or more causes of action, where they are such as it is provided by section four hundred and eighty-four may be united. A cause of action under subdivision 10 of this section cannot be joined with one under another subdivision, although arising out of the same transaction. (*People v. Wells*, 52 App. Div. 583). The plaintiff cannot unite in one action, ejectment and trespass *quare clausum fregit* (*Budd v. Bingham*, 18 Barb. 494); nor an action to recover damages for flooding plaintiff's land, caused by defendant's railroad embankment, with one for breach of duty in neglecting to erect a farm crossing; the latter being for breach of implied contract. (*Thomas v. Utica etc. R. R. Co.*, 97 N. Y. 245). A complaint which stated three causes of action, one for breach of contract, one for personal injuries, and one for injuries to personal property, is subject to demurrer for misjoinder, although they are blended in a single count. (*Townsend v. Coon*, 7 Civ. Proc. Rep. 56). So, a complaint containing a cause of action upon a warranty of a chattel sold, and also a cause of action for false representations in respect to such chattel, is demurrable for misjoinder; as the two causes of action do not arise out of the same transaction. (*Seymour v. Lorillard*, 8 Civ. Proc. Rep. 90). A cause of action for trespass on lands cannot be joined with a cause of action for slander of title of such lands (*Dodge v. Colby*, 37 Hun, 515; reversed on ground that demurrer did not specify this improper joinder, 108 N. Y. 445, 452); nor can a cause of action against the personal representatives of a deceased person, to impress a lien upon the decedent's real estate, which is an equitable action, be joined with a cause of action

under the statute, against the heirs and their grantees upon a contract of the decedent. (*Hayward v. McDonald*, 1 How. Pr. N. S. 229). A cause of action for converting property, and a cause of action for the proceeds of real estate on sales of the property, cannot be united in the same complaint; the recovery in tort would bar the action on contract, and vice versa. (*Teall v. City of Syracuse*, 32 Hun, 332). A plaintiff cannot unite a cause of action for negligence, causing the death of one person, of whose estate he is the administrator, with a cause of action for the death of another person, of whose estate he is also the administrator, even though the deaths of both decedents were caused by the same negligence. (*Danaher v. City of Brooklyn*, 4 Civ. Proc. Rep. 286). Two separate and distinct causes of action, arising upon two separate and distinct contracts, in which the plaintiffs are not jointly interested, cannot be united in the same complaint. (*Juliano Ware Co. v. Sands*, N. Y. Daily Reg., Feb. 4th, 1881). An action for a divorce cannot be joined with one for a separation. (*Zorn v. Zorn*, 38 Hun, 237). Two persons, each claiming the whole of a piece of land, cannot unite in an action against a third person in possession, setting forth the title of each plaintiff in a separate count. (*Hubbell v. Lerch*, 58 N. Y. 237). A claim which accrued to the plaintiff personally, and one which accrued to a deceased person whom plaintiff represents, cannot be united in one action (*Hall v. Fisher*, 20 Barb. 441); nor a cause of action against all the defendants jointly, and against one, or some of them, less than all; severally (*Barnes v. Smith*, 16 Abb. Pr. 420); nor a cause of action against defendant individually, with other causes against him as trustee, and separate demands against other defendants (*Smith v. Goertner*, 40 How. Pr. 185); nor a cause of action which accrued to a testator with another which accrued to his personal representatives after his death. (*Ark-
enburgh v. Wiggins*, 13 App. Div. 96; affd. without op., 162 N. Y. 596).

Sec. 4. How Objection of Misjoinder Taken.

The defendant may demur to the complaint where one or more of the following objections thereto appear upon the face thereof; * * *. 7. That causes of action have been improperly united (Co. Civ. Proc. § 488). Where any of the matters enumerated in section four hundred and eighty-eight of the code of civil procedure as grounds of demurrer, do not appear on the face of the complaint, the objection may be taken by answer. (Co. Civ. Proc. § 498). If such an objection is not taken, either by demurrer or answer, the defendant is deemed to have waived it; except the objection to the jurisdiction of the court, or to the objection that the complaint does not state facts sufficient to constitute a cause of action. (Co. Civ. Proc. § 499). A single instance of two misjoined causes of action is sufficient to overthrow the complaint, no matter how many causes of action, properly or improperly joined, the complaint may contain. (*Stanton v. Missouri Pacific Ry. Co.*, 15 Civ. Proc. Rep. 296, 306). The objection that causes of action are joined which do not affect all defendants may be taken by demurrer by a party who is so affected. (*Nichols v. Drew*, 94 N. Y. 22; *Nash v. Hall Signal Co.*, 90 Hun, 354). If the complaint contains several causes of action improperly united, the plaintiff's failure to state them separately and number them does not deprive the defendant of the right to demur. (*Goldberg v. Utley*, 60 N. Y. 427; *Lanning v. Galusha*, 135 N. Y. 239).

ARTICLE IV.**DEMAND OF JUDGMENT.****SECTION.**

1. For final judgment.
2. Interlocutory and final judgment.

Sec. 1. For Final Judgment.

The complaint must contain a demand of the judgment to which the plaintiff supposes himself entitled. (Co. Civ. Proc. § 481, subd. 3). In the code of procedure the demand was for *the relief* to which the plaintiff

supposed himself entitled; and the commissioners state that the substitution of "judgment" for "relief" is made to exclude prayers for provisional remedies from the complaint. From Mr. Throop's notes of sections four hundred and eighty-one and twelve hundred and seven of the code, it seems that, strictly speaking, the use of the term "relief," as applied to that aid which the suitor demands, as a conclusion which, he supposes, follows from the facts set forth in his pleading, is no longer proper; and that the term "relief" led to much confusion, especially with respect to prayers for provisional remedies; and that while the material portions of the original sections have been preserved intact, the word "judgment" has been substituted in place of "relief," in accordance with the plan followed throughout the act. (See 2 McCarty Civ. Proc. Rep. 91, note).

The plaintiff may demand any kind of relief (judgment) to which he supposes himself entitled, and is not confined to any one kind of relief. (*Hall v. Hall*, 38 How. Pr. 97). A party should ask that relief (judgment) to which he supposes himself entitled; but by so doing he is not precluded from declining to take any part of such relief, or from demanding, additional relief, warranted by the facts. Judgment is given by the court in accordance with the facts, and not the requests of suitors. (*Bell v. Merrifield*, 109 N. Y. 202). The demand for relief is given controlling effect only when there is no answer; then the judgment cannot exceed that which is asked for in the complaint; but if an answer is interposed, the court grants any relief, within the case shown by the complaint and embraced within the issues. (*Dusenbury v. Dusenbury*, 2 McCarty's Civ. Proc. Rep. 91; *Cleaurant v. Maillard*, 56 App. Div. 11). Where there is no answer, the judgment shall not be more favorable to the plaintiff, than that demanded in the complaint. Where there is an answer, the court may permit the plaintiff to take any judgment, consistent with the case made by the complaint, and embraced within the issue. (Co. Civ. Proc. § 1207). The provisions of the first sentence of this section were intended to protect defendants who suffered default.

(*Peck v. N. Y. & N. J. Ry. Co.*, 85 N. Y. 246). The latter clause seems designed to relieve a plaintiff from any technical objection, that he has not prayed for the precise relief to which on the trial it may seem he is entitled (*Murtha v. Curley*, 90 N. Y. 372); but the relief to be granted must still be consistent with the case made by the complaint. (*Bradley v. Aldrich*, 40 N. Y. 504). A demurrer is not an answer within the meaning of this section. (*Kelly v. Downing*, 42 N. Y. 71; *Beach v. Cooke*, 28 N. Y. 508). In the case of *Graham v. Read*, (57 N. Y. 681), it was held that where the complaint was based on the validity of a transaction, judgment could not be based on its illegality; and where a complaint is drawn so as to embrace both legal and equitable relief, if only the allegations warranting legal relief are established, plaintiff cannot have equitable relief. (*Stevens v. Mayor, etc.*, 84 N. Y. 296). But where there is no answer, the plaintiff cannot have any relief, not demanded. (*Simonson v. Blake*, 12 Abb. Pr. 331; 20 How Pr. 484). Thus, where in a foreclosure, the plaintiff in his complaint only prays for a sale, he cannot have a judgment for the payment of any deficiency, in the absence of an answer. (*Id.*). Where the judgment in such case, gives relief not demanded, it is not a mere irregularity, but it is absolutely unauthorized, and the defendant may move to vacate it; and is not limited to one year in which to make such motion. (*Id.*). Neither is his sole remedy by motion; he may resist or attack such an unauthorized judgment or decree in any form he may elect. (*Clapp v. McCabe*, 155 N. Y. 525). If the defendant answers, the demand of relief becomes immaterial (*Marquat v. Marquat*, 12 N. Y. 336), and the court is to give such relief as the parties are entitled to, whether demanded in the complaint or not (*Jones v. Butler*, 20 How. Pr. 189); provided the relief is consistent with the case made by the complaint, and embraced within the issue (*Cowenhoven v. City of Brooklyn*, 38 Barb. 9), and is limited to such relief as is proper, in reference to the parties before the court. (*Smith v. Howard*, 20 How. Pr. 151). The relief is limited by the allegations of

fact contained in the pleadings, though the proof may show the plaintiff entitled to a different remedy. (*Anon.* 15 Abb. N. S. 171). There is no objection to uniting in one action, claims both legal and equitable (*N. Y. Ice Co. v. N. West Ins. Co.*, 21 How. Pr. 296; S. C., 23 N. Y. 357), provided they are not inconsistent with each other. (*Linden v. Fritz*, 9 Leg. Obs. 80; *Reubens v. Joel*, 13 N. Y. 488). In some cases alternative relief may be prayed. (*Linden v. Fritz*, *supra*). A complaint against two joint assignees of a lease in fee, for the whole rent, averring that the plaintiff did not know what their interest was, and asking a joint or several judgment as he proved just, was held proper. (*Van Rensselaer v. Layman*, 10 How. Pr. 505; 39 How. Pr. 9). In the case of *Short v. Barry* (40 How. Pr. 210) where the complaint was held to clearly state an action at law, and the demand was for equitable relief, viz., an accounting, it was held that the demand for an accounting was merely nugatory, as it was not only wholly unsupported by any allegation of the complaint, but was inconsistent with the case made with it, and the referee was in error in proceeding with an accounting in the case; and the judgment on the report of the referee was reversed, and a new trial ordered. Objections to the prayer for relief should be taken by motion. (*Durant v. Gardner*, 19 How. Pr. 94). The complaint must specify the relief demanded, and the demand must not be vague or hypothetical. (*Durant v. Gardner*, 19 How. Pr. 94). A prayer for general relief will not be struck out. (*Hemson v. Decker*, 29 How. Pr. 385). But in *Durant v. Gardner* (*supra*), it was held that where a demand was for a specified amount, the additional demand for general relief will be stricken out. But where there is a general demand for relief, it controls as to the amount recoverable; and hence plaintiff may recover the damages therein alleged, although he recovers only upon one of the three counts for the same injury, each of which alleged his damages at a smaller sum. (*Schultz v. Third Ave. R. R. Co.*, 89 N. Y. 242). A plaintiff should not be turned out of court, when an answer has been interposed, because he has prayed for too much, or too

little, or for wrong relief. (*Murtha v. Curley*, 90 N. Y. 372; *Colrick v. Swinburne*, 105 N. Y. 503). Where a party has sworn to the amount of his demand, that fact will not defeat an application for leave to increase such demand, where a good cause is shown for the misstatement in the original complaint. (*Merchant v. N. Y. Life Ins. Co.*, 2 Co. Rep. 66). The relief demanded in the complaint does not necessarily characterize the action, or limit the plaintiff's remedy. (*Rindge v. Baker*, 57 N. Y. 209). A pleading is not demurrable because the proper form of relief is not demanded (*Hemmingway v. Poucher*, 98 N. Y. 281; *Parker v. Pullman & Co.*, 36 App. Div. 208), provided a valid legal or equitable cause of action is set forth (*Wisner v. Consolidated Fruit Jar Co.*, 25 App. Div. 362), as the demand for relief forms no part of the issues in the case (*Hall v. Hall*, 38 How. Pr. 97); yet the character and nature of the relief demanded may properly be considered by the court, when passing upon a demurrer interposed to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action, in determining the nature of the action. (*Swart v. Boughton*, 35 Hun, 281). No mere demand for costs, nor the absence of such demand can affect the plaintiff's rights to recover them. It is therefore unnecessary to demand them in any case, although it is customary to do so.

Sec. 2. Interlocutory and Final Judgment.

In an action triable by the court, without a jury, the plaintiff may, in a proper case, demand an interlocutory judgment, and also a final judgment, distinguishing them clearly. (Co. Civ. Proc. § 482). Before the amendatory act of 1877, the code (§ 1201) contained the following definition of an interlocutory judgment: "A judgment is interlocutory, where it is a determination of the action, or of an issue presented by the pleadings; but either leaves to be determined by the final judgment, the extent of the recovery, or other relief, to which the successful party is entitled; or reserves a question which must be determined, before final judgment can be awarded." But the section was expunged

from the code, so that there now is no statutory definition of an interlocutory judgment. In *Mora v. Sun Mut. Ins. Co.* (13 Abb. Pr. 304), it was held that an interlocutory judgment is one that decides, not the case, but only some intervening matter relating to the cause of action; and it is in aid of the final judgment. (*Chamberlain v. Dempsey*, 36 N. Y. 144). A temporary injunction order, which frequently operates as a decision of the whole question may be granted in a proper case, where the complaint contains a demand for it as a part of the relief sought; and where the complaint shows that the plaintiff is entitled to it (Co Civ. Proc. § 603); but it should not be granted unless the complaint contains such a demand, nor even then, where other remedies will suffice. (*Burch v. Cavanaugh*, 12 Abb. Pr. N. S. 410).

ARTICLE V.

SERVICE OF THE COMPLAINT.

SECTION.

1. When and how to be served.
2. Consequence of failure to serve.

Sec. 1. When and How to Be Served.

If a copy of the complaint is not delivered to a defendant, at the time of the delivery of a copy of the summons to him, either within or without the state, his attorney may, at any time within twenty days after the service of the summons is complete, serve upon the plaintiff's attorney a written demand of a copy of the complaint, which must be served within twenty days thereafter. The demand may be incorporated into the notice of appearance. But where the same attorney appears for two or more defendants, only one copy of the complaint need be served upon him; and if, after service of a copy of the complaint upon him, as attorney for a defendant, he appear for another defendant, the last defendant must answer the complaint within twenty days after he appears in the action. (Co. Civ. Proc. § 479). The plaintiff may serve his complaint at the same

time that the summons is served. (Co. Civ. Proc. § 419). It is very common practice to attach the complaint to the summons; but if the complaint is not served with the summons, the plaintiff may, at any time after the service of the summons, voluntarily serve the complaint. (*Van Pelt v. Boyer*, 7 How. Pr. 325). If the defendant's attorney, within twenty days after the service of the summons, demands a copy of the complaint, it must be served within twenty days after such demand, unless there has been a stipulation or order extending the time for such service. (*Baker v. Curtiss*, 7 How. Pr. 478). Plaintiff may upon an affidavit showing grounds therefor, obtain an order extending the time for serving a copy of the complaint. (*Littlefield v. Murin*, 4 How. Pr. 306). When the time to serve any pleading has been extended by stipulation or order for twenty days, no further time shall be granted by order, except upon two days' notice to the adverse party of the application for such order. (General Rule 24).

Sec. 2. Consequence of Failure to Serve.

If the plaintiff's attorney fails to serve a copy of the complaint, as prescribed in section four hundred and seventy-nine, the defendant may apply to the court for a dismissal of the complaint. (Co. Civ. Proc. § 480). The code of procedure did not expressly provide any penalty for an omission to serve a copy of the complaint when demanded. If the motion to dismiss the complaint is granted, the action will be dismissed. (*Baker v. Curtiss*, 7 How. Pr. 478). This right is confined to those defendants who are served with summons. One of several defendants, who has not been served with a summons or complaint, cannot voluntarily appear and move to dismiss the complaint, where his rights are not affected. He must be contented to remain quiet out of court until invited to appear there. (*Tracy v. Reynolds*, 7 How. Pr. 327). The plaintiff has a right in such cases to serve a complaint upon those who have been served with a summons; and to omit service upon the others; and those served with a complaint cannot ask the court to dismiss the complaint,

in favor of the other defendants. (*Travis v. Tobias*, 7 How. Pr. 90). If a copy of the complaint is served after the twenty days has expired, and there has been no order or stipulation extending the time for service, it is in fact no service at all and the defendant need not receive it; and he may safely disregard it. He should not retain it, however, but must promptly return it to the plaintiff, or he will be held to have waived the irregularity in such service. (*Baker v. Curtiss*, 7 How. 478). In the case last cited, it was held that the defendant was under no obligation to return a complaint, served after a notice of motion to dismiss the complaint had been served upon the plaintiff's attorney.

CHAPTER XI.

THE ANSWER.

- ARTICLE I...When required.
- ARTICLE II...Form and what to contain.
- ARTICLE III...Denials.
- ARTICLE IV...New matter.
- ARTICLE V...Counter-claim.
- ARTICLE IV...Demand for relief.

ARTICLE I.

WHEN REQUIRED.

The only pleading on the part of the defendant is either a demurrer, or an answer. (Co. Civ. Proc. § 487). As a demurrer may be interposed, not only to the complaint, but to the answer or reply, it will be considered later.

Any objection to any of the causes of action, set out in the complaint, which does not appear on the face of the complaint, or which requires proof of extrinsic facts, must be taken by answer. (Co. Civ. Proc. § 498). If one defendant requires affirmative relief as against a co-defendant, he must state the facts, which entitle him to such relief, in the answer. (Co. Civ. Proc. § 521). The defendant may answer one or more of the causes of action in the complaint, and may demur to others. (Co. Civ. Proc. § 492).

ARTICLE II.

FORM AND WHAT TO CONTAIN.

SECTION.

1. Form.
2. What to contain.

Sec. 1. Form.

Usually the answer should commence with a caption, showing the court in which the action is brought, and the title of the action. The usual beginning of the answer is "the defendant for his answer to the plaintiff's complaint etc.;" but the answer need not be entitled; although it is necessary that it should refer to the action, so that it will appear in what action, and for what defendant, it is interposed. (*Didier v. Warner*, 1 Co. Rep. 42). Nor is it necessary that the answer be couched in any particular language, or form of words. It has even been held that an answer is good, if it is endorsed upon the back of the complaint. (*Didier v. Warner*, *supra*).

Sec. 2. What to Contain.

The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief.

2. A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition. (Co. Civ. Proc. § 500). It must be borne in mind that a "defense" under this section can consist only of new matter, that is, something outside of the "material allegations of the complaint." A general denial puts in issue all that the plaintiff has necessarily pleaded. (*McManus v. Western Assurance Co.*, 43 App. Div. 550). Pleading as a "defense" something which could be put in issue under the general denial may prejudice a defendant's case. See *Reed v. Hayt* (51 N. Y. Superior Ct. Rep. 121; *affd.* on opinion below, 109 N. Y. 659), and *Whitlatch v.*

Fidelity Co. (149 N. Y. 45). It will also be noticed, that the denial authorized by the section, is only of the material allegations of the complaint, which are sought to be controverted; and only such allegations should be put in issue. (*King v. Utica Ins. Co.*, 6 How. Pr. 485). Every fact which is averred in the complaint by necessary implication, may be denied, as though it were expressly alleged. (*Prindle v. Caruthers*, 15 N. Y. 425). Immaterial allegations in the complaint need not be denied (*Linton v. U. F. Co.*, 124 N. Y. 533), and if the issue which is made by the answer is upon an immaterial allegation only, it will be held to be frivolous. (*Fairchild v. O. C. & R. Ry. Co.*, 15 N. Y. 337). The test of a material allegation is, whether it is necessary for the plaintiff to prove it to establish his cause of action; and no allegation is material, if the absence of it does not prevent a plaintiff from recovering. (*Oechs v. Cook*, 3 Duer, 161). In an action for libel, it has been held that a denial of the motives of the defendant in publishing a libel, is not material. (*Fry v. Bennett*, 5 Sand. 54). Nor are allegations of time or place material, unless time or place is of the substance of the action. (*Livingston v. Hammer*, 7 Bosw. 670). Allegations of value, in an action for conversion, or replevin, are immaterial, and should not be denied. (*McKenzie v. Farrell*, 4 Bosw. 192, 202). Circumstances of aggravation in an action for a tort (*Gilbert v. Rounds*, 14 How. Pr. 46), or allegations of damage in an action for unliquidated damages (*Hackett v. Richards*, 3 E. D. Smith, 13, 31), are immaterial allegations, and should not be denied in the answer. The answer should not deny conclusions of law, as that the defendant is indebted (*Emery v. Baltz*, 94 N. Y. 408); but if the complaint alleges no fact, and only that the defendant is indebted to the plaintiff, an answer that he is not indebted is good. (*Anonymous*, 2 Co. Rep. 67). Mixed allegations of law and fact may be denied. (*Davis v. Hoppock*, 6 Duer, 254). The denial should be direct, unequivocal, not evasive, and not by way of negative pregnant. (*West v. American Exchange Bank*, 44 Barb. 175; *Baker v. Bailey*, 16 Barb. 54; *Miller v. Miller*, 1

Abb. N. C. 30). If the plaintiff go to trial on an answer containing a denial in the form of a negative pregnant, without availing himself of the remedy of a motion to make the answer more definite and certain, such an answer is held to put the allegations of the complaint in issue. (*Armstrong v. Danahy*, 75 Hun, 405). It is not sufficient, that the answer merely implies that the allegation is controverted, or justifies an inference that such is its effect. (*West v. American Exchange Bank, supra*).

ARTICLE III.

DENIALS.

SECTION.

1. General denials.
2. Specific denials.
3. Denials except as admitted.
4. What is not a denial.
5. What may be proved under a general denial.

Sec. 1. General Denials.

The general denial, as the term implies, is a denial in gross of all of the allegations of the complaint. (*Dennison v. Dennison*, 9 How. Pr. 246). But it has been held that a denial of several, though not of all, the allegations in the complaint is a general denial. (*Thompson v. The Erie Railway Co.*, 45 N. Y. 468). Denials are not required to be in any particular form, or to be couched in any special phraseology; but they must be expressed in language that conveys to the mind of the pleader, a clear understanding of the facts that are intended to be put in issue. (*Clark v. Dillon*, 97 N. Y. 370, 373). The usual form of a general denial is, "the defendant denies each and every allegation in the complaint." There must be a denial; an averment that the defendants do not admit, is not sufficient (*Bomberger v. Turner*, 13 Ohio St. 263); nor is it sufficient to aver, of the allegations of the complaint, that they are not true. (*Versann v. McGregor*, 23 Cal. 339). A denial of each and every material allegation of the complaint, is not good on a motion to make definite and certain. (*Mattison v. Smith*, 1 Robt. 706; *Seward v. Miller*, 6 How. Pr. 312).

A statement in the answer, that the defendant "says he denies etc." is good. (*Jones v. Ludlam*, 74 N. Y. 61). After much diversity of opinion, it is now settled that a general denial on information and belief is good in form. (*Bennett v. Leeds Mfg. Co.*, 110 N. Y. 150). The code permits the defendant to allege, in regard to the allegations of the complaint, that he has no knowledge or information thereof, sufficient to form a belief, and this is a general denial; but the right to deny in this manner is a statutory right, and the form given by the code, must be followed strictly. (*Lloyd v. Burns*, 38 Super. 423; *affd.* without opinion, 62 N. Y. 651; *Steinback v. Diepenbrock*, 52 App. Div. 437). An answer denying knowledge ^{or information} sufficient to form a belief as to all the allegations contained in plaintiff's complaint is allowable under this section. (*Rosensteil v. Van Cott*, 5 App. Div. 128). Several of the earlier cases held that a denial of knowledge or information sufficient to form a belief, or a denial upon information and belief, as to matters presumably within the defendant's knowledge, was frivolous. (*Fallon v. Durant*, 60 How. Pr. 178; *Lewis v. Acker*, 11 How. Pr. 163). The trend of the later cases is in the opposite direction; they seem to hold that any form of answer allowed by the code, which presents such an issue as was raised by the general issue at common law, cannot be deemed frivolous. (*Sheldon v. Heaton*, 78 Hun, 50; *Gruenstein v. Jablonsky*, 1 App. Div. 580; *Trumbull v. Ashley*, 26 App. Div. 356; *Hill v. Warner*, 39 App. Div. 424). It is likewise held by the authorities of more recent date that any such form of answer should not be stricken out as *sham*, though it be concededly false and no matter how its falsity appears. (*Humble v. McDonough*, 5 Misc. 508; *Howe v. Elwell*, 57 App. Div. 357; *Gallagher v. Merrill*, 13 App. Div. 182). The general answer of a guardian is substantially a denial of knowledge or information sufficient to form a belief, and raises an issue. (*Roosevelt v. Schermerhorn*, 32 Misc. 287).

Sec. 2. Specific Denials.

A specific denial is a denial of one of the allegations of the complaint, or of each of the allegations of the complaint separately. (*Dennison v. Dennison*, 9 How. Pr. 246). Such a denial should be made in such terms as will enable the plaintiff to know, by the language made use of, the particular portion of the complaint to which it is intended to be directed. (*Miller v. McClosky*, 1 Civ. Pro. Rep. 252, 259). The practice of denying certain allegations of the complaint by referring to them as certain paragraphs of the complaint has become well nigh universal and is to be commended as a method of simplifying the answer; an answer drawn in this way is sufficient on a motion to make it more definite and certain. (*Fairbanks v. Blaut*, 24 Civ. Proc. Rep. 334; S. C. 67 N. Y. St. Rep. 583; *Hoffman v. Susemihl*, 15 App. Div. 405). Such reference should not be made to the *folios* of the complaint, as the folioing is changed in the printed record in case of an appeal (*Baylis v. Stimson*, 110 N. Y. 621), and the appellate court being unable to distinguish the original folios, will consider the whole complaint admitted (*Williams v. Lindblom*, 68 Hun, 173; *affd. on opinion below*, 142 N. Y. 682; *Lyth v. Green*, 21 App. Div. 300). In all cases the answer should disclose clearly and unequivocally the points of the complaint which are denied, and the defendant is responsible for any failure so to express his meaning. There is no obligation on the plaintiff to move to make the answer more definite and certain, and he can take advantage on the trial of any failure to controvert the allegations of the complaint. (*Clark v. Dillon*, 97 N. Y. 370).

Sec. 3. Denials Except as Admitted.

It is not unusual for the answer, after certain allegations, to allege that the defendant denies each and every allegation of the complaint, not hereinbefore admitted. Strictly speaking that is neither a general nor a specific denial (*Millville Manufacturing Co. v. Salter*, 15 Abb. N. C. 305); but in practice it has been allowed, as making the pleading brief and simple. (*Parshall v.*

Tillou, 13 How. Pr. 7; *Calhoun v. Hallen*, 25 Hun, 155; *Pittenger v. S. T. Masonic Relief Assn.*, 15 App. Div. 26; *Owens v. Hudnut's Pharmacy*, 20 Civ. Proc. Rep. 145; *Allis v. Leonard*, 46 N. Y. 688; 22 Albany Law Jour. 28). It is now settled that an allegation in the answer in this form, is good as a denial of every allegation of the complaint, which is not specifically admitted in the answer. (*Griffin v. Long Island R. R. Co.*, 101 N. Y. 349). But such a denial must be so plain that there can be no mistake in ascertaining what is put in issue (*Haines v. Herrick*, 9 Abb. N. C. 379; *Barton v. Griffin*, 36 App. Div. 572), and the defendant is only permitted to use this form, when the excepted denials are so specific, as to clearly point out the allegations of the complaint to which they were intended to apply. (*Tracy v. Baker*, 38 Hun, 263, 265). It has been held that an answer, denying each and every material allegation, not contrary to, or inconsistent with, allegations in the answer, heretofore admitted, or avoided, ignored, or denied, is too indefinite. (*Hammond v. Earle*, 5 Abb. N. C. 105). So, it has been held that a denial of each and every allegation not hereinbefore admitted or avoided, was not a sufficient denial to form an issue. (*Miller v. McClosky*, 1 Civ. Proc. Rep. 252). It was held that a denial except as admitted, qualified, or explained, would be deemed frivolous. (*Hoffman v. N. Y. Lake Erie & W. R. R. Co.*, 50 Super. 403). An answer, alleging that it denies each and every allegation in the complaint contained, not hereinbefore specifically admitted or denied, or not hereinbefore specifically admitted or avoided, was held not to be good. (*McEncroe v. Decker*, 58 How. Pr. 250). If the answer does not contain a general denial, the defendant, and not the plaintiff, must take the labor of sifting out the true allegations in the complaint from the false, and specifying what he denies, as distinguished from what he admits, or assume the risk of making admissions by reason of negative pregnant, or averments which are overlooked.

Sec. 4. What is not a Denial.

Allegations of fact, inconsistent with the complaint, but not otherwise denying the allegations of the complaint, do not put them in issue. (*West v. American Exchange Bank*, 44 Barb. 175; *Fleischmann v. Stern*, 90 N. Y. 110). In an action for goods sold, an allegation that the defendant has no recollection as to the specific sum to which the bill of goods amounted, is not such a denial as is authorized by the code. (*Nichols v. Jones*, 6 How. Pr. 355). Where the answer admits the genuineness of an instrument, a copy of which is annexed to the complaint, but states that the original is required, it does not amount to a denial of the instrument. (*Murray v. N. Y. Life Ins. Co.*, 85 N. Y. 236). If the complaint alleges the assignment of the cause of action to the plaintiff, an averment, setting up as new matter, that the plaintiff is not the owner of the cause of action, does not put the assignment in issue, unless the answer contains a general denial. (*Fosdick v. Groff*, 22 How. Pr. 158). In an action brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation. (Co. Civ. Proc. § 1776). For the purposes of raising an issue as to the incorporation, and continued existence, of a corporation, therefore, there is no denial of any allegations of a complaint touching such matters, unless there is an "affirmative allegation" that the alleged corporation was not incorporated, or ceased to exist, etc. (*Lamson Cons. Store Service Co. v. Conyngham*, 11 Misc. 428); a simple denial of the allegations of the complaint as to incorporation raises no issue on that point. (*Nickerson v. Canton Marble Co.*, 35 App. Div. 111).

Sec. 5. What may be Proved Under a General Denial.

Any fact which is necessary to be established by the plaintiff, to authorize a recovery on his part, may be disproved under a general denial. (*Weaver v. Barden*, 49 N. Y. 286; *McManus v. Western Ass. Co.*, 43 App.

Div. 550). But a defense founded on new matter, or one which confesses and avoids the cause of action, cannot be proved unless it is set up in the answer. (*McKyring v. Bull*, 16 N. Y. 297). It will be seen that the application of this rule depends largely on the form of the complaint. For instance, the general rule is well settled, that the defense of payment is not admissible under a general denial; and that the title of a third person cannot be shown, in an action for the possession of personal property, under a general denial. (*Stowell v. Otis*, 71 N. Y. 36). But if non-payment is a necessary part of the plaintiff's case, the defendant may disprove it, although he has not set up payment in the answer (*Knapp v. Roche*, 94 N. Y. 329); or if plaintiff, to entitle him to recover, must show title, the defendant, under a general denial, may prove that the plaintiff has no title, and may even prove title in a stranger, although he does not connect himself with that title. (*Griffin v. Long Island R. R. Co.*, 101 N. Y. 348). In an action for a tort, the defendant under a general denial, may prove any fact, which tends to reduce the actual damages sustained by the plaintiff (*Wandell v. Edwards*, 25 Hun, 498); although as will be seen hereafter, he cannot prove anything which goes merely in mitigation of punitive damages, by way of showing the absence of malice. Where the plaintiff sues for a balance of account, the defendant, under a general denial, may show facts which disprove the allegations of the complaint that such a balance was due on a given date; for instance, he may prove the plaintiff's liability as endorser, upon notes given in renewal of notes discounted for the plaintiff, and placed to his credit. (*Goodale v. Central Nat. Bank*, 16 Wk. Dig. 364). In an action to recover a loan made by a check, it was held that the defendant, under a general denial, may show facts tending to disprove the allegation of a personal loan by the plaintiff. (*Koehler v. Adler*, 91 N. Y. 657). So, in an action to recover damages for injuries to the plaintiff's dwelling alleged to have been caused by negligent blasting in excavating on defendant's premises, the plaintiff was properly permitted to give in evidence, under the general

denial, a written contract between himself and another by the terms of which the latter was to make the excavation. (*Roemer v. Stryker*, 142 N. Y. 134). Each case stands on its own facts and form; the question is in every instance, whether the evidence offered under the general denial tends to overthrow a fact material and essential to the plaintiff's case.

ARTICLE IV.

NEW MATTER.

SECTION.

1. What it is.
2. Defenses.
3. Partial defenses.

Sec. 1. What it is.

New matter consists of some fact which the plaintiff is not bound to prove, to establish his cause of action, and which goes in avoidance, or discharge of the cause of action alleged in the complaint. (*Bell v. Yates*, 33 Barb. 627; *Manning v. Winter*, 7 Hun, 482). Matter, which merely denies the allegations of the complaint, or states circumstances which disprove them, is not new matter. (*Raddle v. Ruckgaber*, 3 Duer, 684). New matter may be pleaded either for a complete or partial defense to the cause of action, or any cause of action, set up in the complaint, or in mitigation of damages, or by way of counter-claim. Within this definition of new matter are included the statute of limitations (Co. Civ. Proc. § 413; *Desengremel v. Desengremel*, 24 Hun, 457); adverse possession (*Hanse v. Mead*, 27 Hun, 162); right of way by prescription, or by necessity (*Burlew v. Hunter*, 41 App. Div. 148); usury (*Morford v. Davis*, 28 N. Y. 481; that the title is in a person other than the plaintiff, or that the plaintiff is not the real party in interest (*Smith v. Hall*, 67 N. Y. 48); in an action on a foreign judgment that the foreign court had not jurisdiction (*Rice v. Coutant*, 38 App. Div. 542); non-joinder of parties, not appearing on the face of the complaint (*Reed v. Hayt*, 51 Super. 121; *affd. on opinion below*, 109 N. Y. 659); that there is another action

pending for the same cause (*Remington v. Walker*, 21 Hun, 322; modified on another point, 99 N. Y. 626); the statute of frauds when the fact that the contract is within the statute does not appear on the face of the complaint (*Matthews v. Matthews*, 154 N. Y. 288; *Crane v. Powell*, 139 N. Y. 379; *Myers v. Dorman*, 34 Hun, 115); that the contract sued on is invalid for fraud (*Dubois v. Hermance*, 56 N. Y. 673, 674); or duress; or because of the coverture or infancy of the defendant (*Westerrevelt v. Ackley*, 62 N. Y. 505); or as against public policy, where the facts showing the illegality do not appear in the complaint or in plaintiff's proof (*Milbank v. Jones*, 127 N. Y. 370); of course the court is bound to refuse its aid in an attempt to enforce a contract against public policy, and, where it appears on the face of the record that the contract is of that character, the plaintiff will not be allowed a recovery (*Baird v. Sheehan*, 38 App. Div. 7; *Dunham v. Hastings Pavement Co.*, 56 App. Div. 244). So the defendant must set up as new matter, any defense which, admitting or not denying the contract, alleges the discharge of the defendant (*Cornell v. Dakin*, 38 N. Y. 253); or payment of the debt (*McKyring v. Bull*, 16 N. Y. 297; *Seward v. Torrence*, 3 Hun, 220); or tender (*Becker v. Boon*, 61 N. Y. 317); or a release (*Horton v. Horton*, 83 Hun, 213); or accord and satisfaction (*Chapin v. Pratt*, 49 N. Y. St. Rep. 42), but a judgment for a defendant will not be reversed for the admission of testimony to establish an accord and satisfaction, under the general denial, if no objection was made upon the trial. (*Niggli v. Foehry*, 83 Hun, 269); or, in an action for wrongs, anything which justifies the act of the defendant, either by showing that he acted by authority (*Graham v. Harrower*, 18 How. Pr. 144); or with license (*Clifford v. Dam*, 81 N. Y. 52); or in self-defense; or a justification in slander. The grounds of demurrer specified in section 488 of the code of civil procedure (with the exception of the objection to the jurisdiction and the objection that the complaint does not state facts sufficient to constitute a cause of action) where the objections do not appear upon the face of the complaint, must be taken

by setting up the new matter showing such defenses in the answer. (Co. Civ. Proc. §§ 498, 499; *Tucker v. Manhattan R. Co.*, 78 Hun, 439). So the defense in an equity suit that the plaintiffs have an adequate remedy at law must be set up by answer. (*Tripp v. Hunt*, 45 App. Div. 100; *Lough v. Outerbridge*, 143 N. Y. 271, 277).

Sec. 2. Defenses.

Defendant may interpose as many defenses as he has (Co. Civ. Proc. § 507), and they all constitute but one answer. (*Gardner v. Clark*, 21 N. Y. 399). While, strictly speaking, a "defense" is only new matter—something outside of the material allegations of the complaint which are put in issue by a general denial—in common parlance the word is used as meaning any line of opposition to the plaintiff's recovery, whether it be a general denial or by setting up new matter, in confession and avoidance for example. In this section, therefore, the word is used in its loose sense. Each defense should be complete in itself, and should be separately stated and numbered. As to the formal rules for the statement of defenses, see chapter IX, article II. No formal commencement is required, to mark each separate defense. (*Bridge v. Payson*, 5 Sand. 210). The defendant may put his defense upon distinct, and even inconsistent grounds (*Goodwin v. Wertheimer*, 99 N. Y. 149); but the court may require him to elect which he will rely upon. (*Breunich v. Weselman*, 100 N. Y. 609, 610). This, however, will only be done, where from the very nature of the case, it is impossible that the defendant should have two such defenses. (*Hollenbeck v. Clow*, 9 How. Pr. 289; *Conklin v. Woodbury Institute*, 37 App. Div. 610). The following defenses may be pleaded together, and the defendant will not be required to elect between them; the statute of limitations, and a general denial (*Ostrom v. Bixby*, 9 How. Pr. 57); a plea in abatement, and in bar (*Sweet v. Tuttle*, 14 N. Y. 465); a general denial, and infancy (*Mott v. Burnett*, 2 E. D. Smith 50); a general denial, and a release (*Kellogg v. Baker*, 15 Abb. Pr. 286); in

an action for an assault, a general denial, *son assault demesne*, and *molliter manus imposit* (*Lansingh v. Parker*, 9 How. Pr. 288); and in an action for false representation, a general denial, and that the representations were true. (*Otis v. Ross*, 8 How. Pr. 193). In an action for slander, the defendant may prove mitigating circumstances, notwithstanding he has pleaded, or attempted to prove a justification. (Co. Civ. Proc. § 535). In an action for libel a general denial and a plea of justification may be united. (*Kingsley v. Kingsley*, 79 Hun, 569; *Buhler v. Wentworth*, 17 Barb. 649). In an action of replevin, he may set up a denial of the taking, and a justification of it (*Hackley v. Ogmun*, 10 How. Pr. 44); and he may also unite a denial of any knowledge or information sufficient to form a belief as to plaintiff's title, with a claim of lien on the property. (*Townsend v. Platt*, 3 Abb. Pr. 325). But an answer that the defendant is civilly dead, is held to be inconsistent with the fact of answering; and is bad on demurrer. (*Freeman v. Frank*, 10 Abb. Pr. 370). A carrier by water cannot deny that he was the owner of the vessel, and allege that the property shipped was delivered to the plaintiff. (*Arnold v. Dimon*, 4 Sand. 680). A denial of the contract, and an allegation of non-performance by the plaintiff, are inconsistent. (*Lewis v. Acker*, 11 How. Pr. 163). So a general denial, and a plea of tender, have been held inconsistent. (*Livingston v. Harrison*, 2 E. D. Smith 197). But a denial of the full amount claimed, an admission of a less amount, and tender of that, constitute but one defense. (*Spencer v. Tooker*, 12 Abb. Pr. 353). The defendant may set up any defense, existing at the time of the answer, although it arose after the commencement of the action. (*Willis v. Chipp*, 9 How. Pr. 568; *Benditt v. Annesley*, 42 Barb. 192). A dilatory defense cannot be pleaded unless it is verified. (Co. Civ. Proc. § 515).

Sec. 3. Partial Defenses.

A partial defense may be set forth, as prescribed in section five hundred and seven of the code of civil procedure, but it must be expressly stated to be a partial

defense to the entire complaint, or to one or more separate causes of action, therein set forth. Upon a demurrer thereto, the question is, whether it is sufficient for that purpose. Matter tending only to mitigate or reduce damages, in an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, is a partial defense, within the meaning of this section. (Co. Civ. Proc. § 508). In an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, the defendant may prove, at the trial, facts not amounting to a total defense, tending to mitigate or otherwise reduce the plaintiff's damages, if they are set forth in the answer, either with or without one or more defenses to the entire cause of action. (Co. Civ. Proc. § 536). Anything which goes to a partial extinction of the plaintiff's claim, is a partial defense. (*Bush v. Prosser*, 11 N. Y. 347, 352, 353). A pleader is not required to use the words "partial defense," however, where the answer sets up a defense that clearly appears on its face to be such. (*Howd v. Cole*, 74 Hun, 121). Section five hundred and thirty-six, above cited, only requires the defendant to plead facts in mitigation of damages, when such facts tend to disprove malice, and so diminish or reduce the punitive or exemplary damages which plaintiff might otherwise recover. He may still prove, under a general denial, anything which reduces the actual damages. (*Wandell v. Edwards*, 25 Hun, 498). Where the defendant is in default for want of an answer, facts in mitigation of damages, may be proven upon a reference, or writ of inquiry, to ascertain the damages. (Co. Civ. Proc. § 536). And any facts may be proved which tend to reduce the actual damages, suffered by the plaintiff. (*Hays v. Berryman*, 6 Bosw. 679). Matters, pleaded in mitigation of damages, must be stated to be pleaded for that purpose, or the plaintiff may assume that they are pleaded as a defense, and may demur to them (*Fry v. Bennett*, 5 Sand. 54); or he may move to have them stricken out on motion (*Van Benschoten v. Yaple*, 13 How. Pr. 97); or he may move to state separately what is stated in

mitigation, and what in justification. (*Fink v. Justh*, 14 Abb. Pr. N. S. 107). In pleading such matters, however, it is sufficient to say that he will rely, to mitigate damages, upon the evidence adduced in proof of the other defenses (*Fink v. Justh, supra*); or if justification is alleged, mitigation may be pleaded, by a statement that the defendant will on the trial, rely in mitigation, on facts set up as a justification. (*Howard v. Raymond*, 11 Abb. Pr. 155). He may plead in mitigation the same matter, which he has alleged as a justification. (*Bennett v. Matthews*, 64 Barb. 410). A defendant may count upon the same facts both as a complete and partial defense. (*Zacharias v. French*, 10 Misc. 202).

ARTICLE V.

COUNTER-CLAIM.

SECTION.

1. What it is.
2. Rules for the allowance of a counter-claim.
3. When it should be pleaded.

Sec. 1. What it is.

The counter-claim, specified in section five hundred of the code of civil procedure, must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:

1. A cause of action arising out of the contract or transaction, set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract, existing at the commencement of the action. (Co. Civ. Proc. § 501).

The term counter-claim, as used in the code of civil procedure, is more comprehensive than either recoupment or set-off, but it includes both. (*Vassar v. Liv-*

ington, 13 N. Y. 248, 257; *Clinton v. Eddy*, 1 Lans. 61). A set-off is a money demand, by the defendant against the plaintiff, and refers to a debt or demand independent of, and unconnected with, the plaintiff's cause of action; it may exceed the plaintiff's claim, or fall short of it; recoupment, however, always implies that the plaintiff had a cause of action. The doctrine of recoupment was, before the code, confined to damages for non-performance of the very contract sued upon, and a balance could not be certified in favor of the defendant. (*Boston Silk & Woollen Mills v. Eull*, 1 Swe. 359, 363). The counter-claim may be of a legal or equitable nature. (*Hicksrille & C. R. Co. v. Long Island R. R. Co.*, 48 Barb. 355; *Currie v. Currie*, 6 Bosw. 452). It secures to the defendant the full relief, which a separate action at law, or a bill in chancery, or a cross-bill would have secured him, on the same state of facts. (*Gleason v. Moen*, 2 Duer, 642; *Leavenworth v. Packer*, 52 Barb. 132, 137). The words "must tend to diminish or defeat, in some way the plaintiff's recovery" were inserted in the code of civil procedure for the purpose of excluding certain causes of action, having no connection whatever with that set forth in the complaint, and which could not in any way affect the judgment upon the latter, although the literal reading of the statute would allow them to be interposed; as for instance, where in an action to foreclose a mortgage, the defendant set up as a counter-claim a demand on his part, for the foreclosure of a mortgage on a different piece of property. (Throop's Code, § 501, note). The defendant cannot set up a counter-claim which is totally inconsistent with the cause of action set forth in the complaint, and which can only exist if the plaintiff have no cause of action at all. (*City of Schenectady v. Furman*, 61 Hun, 171; appeal dismissed, 133 N. Y. 696). Facts pleaded which controvert the plaintiff's claim and serve merely to defeat it as a cause of action are inconsistent with the legal idea of a counter-claim, which is a separate and distinct cause of action, balancing in whole or in part that proved by the plaintiff. (*Walker v. A. C. Ins. Co.*, 143 N. Y. 167, 169). In the case last cited it was held

that the reformation of the fire insurance policy sued on could not be accomplished by means of a counter-claim alleging that the policy was issued by mistake; this was only a defense. In an action for dower, an answer setting up that the plaintiff had guaranteed the payment of a mortgage on the lands, and that the defendant owned the mortgage, and it was due, was held to set up a proper counter-claim, because it tended to diminish the plaintiff's recovery. (*O'Dougherty v. Remington Paper Co.*, 1 N. Y. State Rep. 524). In an action to restrain the diversion of water from the plaintiff's mill, an answer setting up that the water claimed by plaintiff did not belong to him, but was wrongfully diverted by plaintiff from defendant, and asking that the plaintiff be restrained from such diversion, is a good counter-claim, as tending to diminish or defeat the plaintiff's recovery; but an answer that the plaintiff wrongfully stores logs in the bed of the stream, which obstruct the flow of water to defendant's mill, and asking an injunction to restrain such storing, is not good, because it does not affect the plaintiff's right to recover. (*Grange v. Gilbert*, 44 Hun, 9; S. C., 6 N. Y. St. Rep. 423). A counter-claim must always contain a cause of action (*Vassar v. Livingston*, 13 N. Y. 248), upon which the defendant could sue the plaintiff, and which he holds and possesses against the plaintiff, at the place where the action is commenced. A defendant cannot avail himself of a counter-claim, which the court, before which the action is pending, has no jurisdiction to try and determine. A counter-claim must be a complete cause of action, existing in favor of the defendant where he asserts it; otherwise, he has no counter-claim there. (*Cragin v. Lovell*, 88 N. Y. 258). In an action on contract the defendant cannot recover on a counter-claim for a cause of action on a separate contract, which is barred by the statute of limitations (*De Lavallette v. Wendt*, 75 N. Y. 579); but where the counter-claim is for a breach by the plaintiff of some part of the very contract sued on, the defendant may successfully set it up, even though more than the statutory period has elapsed between the time when

his right accrued and the time when his answer was served. (*Herbert v. Day*, 33 Hun, 461). In an action of ejectment, an answer setting up that the defendant had paid taxes, and put permanent improvements and repairs upon the premises, the amount of which he sought to set off in extinguishment or reduction of the plaintiff's claim for damages, was held not to constitute a counter-claim. (*Pierson v. Safford*, 30 Hun, 521). Nor, in an action of ejectment for lands devised to the plaintiff, can the defendant counter-claim for a legacy given to him by the will and made chargeable upon the testator's real estate. (*Dinan v. Coneys*, 143 N. Y. 544). The counter-claim must be against all the plaintiffs in the action. (*Goodwin v. Conklin*, 6 Wk. Dig. 131; modified as to another point, 85 N. Y. 21). But where one is sued by an alleged partnership, he may counter-claim against one of the plaintiffs whom he claims to be the sole person interested, and may produce evidence to show that such is the fact and that, therefore, his counter-claim is a proper one. (*Rosenberg v. Block*, 102 N. Y. 255). If others than the plaintiff are liable to the defendant upon it, it is not available (*Mynderse v. Snook*, 1 Lans. 488; *Spofford v. Rowan*, 124 N. Y. 108), unless the plaintiff might have been sued separately. (*More v. Rand*, 60 N. Y. 208). It must belong to the defendant; if owned by him and another person, who is not a party to the action, he cannot set it up. (*Hopkins v. Lane*, 87 N. Y. 501). If there is more than one defendant in the action, it must belong to all the defendants jointly, unless the action is one in which a separate judgment might be rendered against any defendant; in which case, that defendant may interpose any counter-claim that he has. (*Bockover v. Harris*, 43 Super. 548). Any defendant may set up a counter-claim, if a separate judgment may be rendered against him, although a joint judgment would also be proper. (*Bathgate v. Haskin*, 59 N. Y. 533). If a principal and surety are sued together, a successful recoupment by the principal will avail to the benefit of the surety (*Springer v. Dwyer*, 50 N. Y. 19), although the surety cannot set up as a counter-claim, an independent

cause of action belonging to the principal. (*Lasher v. Williamson*, 55 N. Y. 619). The counter-claim must belong to the defendant, at the commencement of the action. (*Chambers v. Lewis*, 11 Abb. Pr. 210; *affd.* 28 N. Y. 454; *Rice v. O'Conner*, 10 Abb. Pr. 362; *Van Valen v. Lapham*, 13 How. Pr. 240, 247; *affirmed* 5 Duer, 689). That portion of the revised statutes which regulated the subject of set-off, has been repealed by the code of civil procedure. One provision of that statute was, that the set-off must have existed at the time of the commencement of the suit, and must then have belonged to the defendant. The code of civil procedure contains no precise equivalent of this requirement, and it has been suggested that, since the repeal of the revised statutes, it is not necessary that the counter-claim must belong to the defendant at the commencement of the action. The cases above cited, however, were decided upon the provisions of the code of procedure, which were substantially like those of the code of civil procedure, and did not refer at all to the revised statutes, and, for that reason, it is supposed that the law is still as stated in those cases. It being necessary that the defendant should allege and prove that the counter-claim existed at the time the action was begun, the plaintiff is entitled to show, under a general denial in his reply, its non-existence at that time. (*John Church Co. v. Clarke*, 77 Hun, 467; S. C. 28 N. Y. Supp. 870). The word *trans-action*, used in the first subdivision of section five hundred and one, does not embrace a pure tort, as assault and battery, or slander. (*Barhyte v. Hughes*, 33 Barb. 320; *Fellerman v. Dolan*, 7 Abb. Pr. 395, note; *Sheehan v. Pierce*, 70 Hun, 22). It is broader and more comprehensive than the word contract, and it embraces something different from that, and is to be taken in its ordinary and popular sense. It must, therefore, be something, that combination of acts and events, circumstances and defaults, which viewed in one aspect, results in the plaintiff's right of action, and viewed in another aspect, results in the defendant's right of action; as these two opposing rights cannot be exactly the same, it follows that there may be, and generally must

be, acts, facts, events, and defaults in the transaction as a whole, which do not enter into each cause of action, but are confined to one of them alone. (*Pomeroy on Remedies*, § 774; *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372, 389, 390). It is not confined to the legal formula of the action, but it is what the transaction comes to when reduced to the concrete charge. (*Empire Feed Co. v. Chatham Nat'l Bk.*, 30 App. Div. 476, 480). So it was held in *Xenia Branch Bank v. Lee* (supra), that the first subdivision of the corresponding section of the code of procedure applied to the three following classes of cases:

1. Actions in which a contract is stated as the foundation of the plaintiff's claim.

2. Actions in which some transaction, not being a contract, is set forth as the foundation of the plaintiff's claim.

3. In actions in which either a contract, or a transaction which is not a contract, is set forth as the foundation of the plaintiff's claim, counter-claims which neither arise out of the same contract, nor out of the same transaction, but are connected with the subject of the action. (Id. pp. 390, 391). In the case last cited, it was held that in an action in the nature of trover, by plaintiff who has indorsed notes or bills of exchange, brought to recover the value thereof from a defendant, in whose possession they are, and who claims title thereto, through the plaintiff's indorsement, it was competent for the defendant to set up title in himself, demand of payment, protest and notice, and to ask by way of counter-claim, a judgment against the plaintiff as indorser. Such a claim was held to be a proper subject of counter-claim in such an action, both as arising out of the contract which formed the foundation of the plaintiff's claim; as arising out of the same transaction, as his cause of action; and as immediately connected with the subject of the action. To the same effect, see *Empire Feed Co. v. Chatham Nat'l Bk.* (30 App. Div. 476). It is well settled, therefore, that in an action to recover damages for a tort, a counter-claim arising out of a contract connected with the subject of the action may be pleaded,

and that in an action on a contract, damages arising out of a tort of the plaintiff may be interposed as a counter-claim if the two causes of action are connected. (*Cooper v. Kipp*, 52 App. Div. 250; *Savage v. City of Buffalo*, 50 App. Div. 136). The difficulty is to determine what is "connected with the subject of the action," and on that point a diversity of judicial opinion may be found. Each case must be determined on its own facts. In an action for the conversion of money which the defendant was alleged to have received as the agent of the plaintiffs under a contract of employment and never paid over, the defendant was allowed to set up, as counter-claims, causes of action for his commissions under the contract, for the breach of that contract in other respects, and for a conspiracy between the plaintiff and others whereby the plaintiff was deprived of his exclusive agency under the contract. (*Ter Kuile v. Marsland*, 81 Hun, 420). So in an action on a bond, the defendant may interpose, as a counter-claim, a cause of action for damages by reason of false and fraudulent representations out of which the bond arose. (*Thomson v. Sanders*, 118 N. Y. 252). In another case, it was held that in an action for the conversion of certain property, an allegation in the answer, that the property was mortgaged by the plaintiffs to the defendant; that a default was made in the performance of the condition of the mortgage; that the defendant took possession of so much of said property as he could find; that the plaintiffs had before the taking secreted and removed a part thereof, which could not be found; that it was subsequently discovered; that the plaintiff had no title to a part of the property taken by the defendant, and which was included in the mortgage; that the same was replevied and taken from the possession of the defendants by the true owners thereof; whereby the defendant sustained loss to the amount of three hundred and fifty dollars; for which amount he demanded judgment against the plaintiff, did not constitute a counter-claim within subdivision one. (*Chamboret v. Cagney*, 2 Swe. 378). In an action to recover installments of rent under a lease, the defendant cannot set up as a counter-claim a claim

for damages resulting from his eviction alleged to have been caused by the creation of a nuisance by the plaintiff's neglect to keep the premises in a proper state of repair, in the absence of an allegation of a covenant for quiet enjoyment; the cause of action attempted to be set up is one in tort and did not arise out of the contract or transaction set forth in the complaint, i. e., the lease, nor is it connected with the subject of the action, the *rent* reserved. (*Romaine v. Brewster*, 10 Misc. 120). Upon proper allegations, however, it seems clear that a tenant can counter-claim for an eviction in an action for rent. (*Ludlow v. McCarthy*, 5 App. Div. 517); or for damages for breach of the covenant to repair. (*T. H. E. Co. v. D. L. I. Co.*, 144 N. Y. 34, 44). In an action to recover for personal property, delivered to the defendant under contract, he was permitted to set up as a counter-claim, a lien in his favor by virtue of the same contract. (*Brown v. Buckingham*, 11 Abb. Pr. 387). In an action to recover for services, rendered as attorney for the defendant's intestate, it was held that the defendant may set up as a counter-claim, that the plaintiff under his employment, became possessed of personal property, which after the death of the intestate, he transferred in fraud of the estate (*Lerche v. Brasher*, 37 Hun, 385; reversed on another ground, 104 N. Y. 157). The two cases last cited, were put upon the ground, that the counter-claim set up in the answer, was a part of the same transaction set forth in the complaint, as the plaintiff's cause of action. In an action, therefore, brought against an attorney to recover damages for the conversion of money collected by him as attorney it was held that the defendant could not counter-claim for professional services not alleged to have been rendered in the same action in which the money in suit was collected. (*Rochester Distilling Co. v. O'Brien*, 72 Hun, 462). The term "subject of the action," used in the same subdivision, has been held to mean, either the property which is sought to be recovered, or in regard to which damages are asked, or the right which has been violated. (*Glenn & Hall Manfg. Co. v. Hall*, 61 N. Y. 226). Mr. Pomeroy defines it, as

denoting the plaintiff's principal primary right, to enforce or maintain which the action is brought. (*Pomeroy on Remedies*, § 775). In an action to set aside a deed of real property and a contract to reconvey, on the ground that the two were in fact a mortgage, and were usurious, and for an accounting by the defendant for rents and profits; a claim for rents alleged to be due to the defendant from plaintiff, for use of a part of the same property, was held to be a proper counter-claim, under subdivision one. (*Barnes v. Gilmore*, 6 Civ. Proc. Rep. 286). In an action to restrain the unauthorized use by the defendant, of a name claimed to be a trade-mark, the defendant was permitted to set up as a counter-claim, that he was the owner, and that the plaintiff had unlawfully used the name, and a prayer for judgment that the plaintiff be restrained from using it. Such a counter-claim was held to be connected with the subject of the action, under this subdivision. (*Glenn & Hall Manfg. Co. v. Hall*, *supra*). In an action for the conversion of wood, the defendant set up that he held a bond and mortgage on lands, which was an insufficient security; that the obligor was insolvent; that the plaintiff was the second mortgagee in possession of the land; and that, with intent to defraud the defendant, he cut the wood in suit, on said land, thereby wasting it; and that on foreclosure of the defendant's mortgage, there was a large deficiency; this was held to be a good counter-claim, under subdivision one of section five hundred and one of the code of civil procedure, as connected with the subject of action. (*Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y. 552). So, a defendant who is sued for the price of certain commodities can set up a counter-claim for overcharges in such sales, caused by a conspiracy between the plaintiffs and plaintiffs' assignors; the defendant has the right to waive the tort and rely upon the implied contract to repay the amount of the overcharges. (*Siebrecht v. Siegel-Cooper Co.*, 38 App. Div. 549). The defendant must clearly show in his answer, however, that he has waived the tort and is suing on the implied contract. (*Slade v. Montgomery*,

53 App. Div. 343). A defendant sued for malicious prosecution cannot set up as a counter-claim a cause of action for damages for deceit by the plaintiff in obtaining goods on credit, which alleged deceit constituted one of the causes of action for which the arrest complained of was made. (*Rothschild v. Whitman*, 132 N. Y. 472). A counter-claim under subdivision two of this section, may be upon a contract, either express or implied (*Andrews v. The Artisans Bank*, 26 N. Y. 298), and for liquidated or unliquidated damages. (*Shubart v. Hartean*, 34 Barb. 447; *Lignot v. Redding*, 4 E. D. Smith, 285). In an action for goods sold, the defendant may set up, under this section, as a counter-claim, damages sustained by him for breach of warranty of the goods. (*Norton v. Dreyfuss*, 51 Super. 491; 106 N. Y. 90; *Nash v. Weidenfeld*, 41 App. Div. 511; *affd.* without op., 166 N. Y. 612). In an action to foreclose a mortgage, where a judgment for deficiency was asked against an obligor on the bond, he may set up as a counter-claim, a cause of action on a contract, which he had against the plaintiff when the action was begun. (*Hunt v. Chapman*, 51 N. Y. 555). In an action on contract, defendant may counter-claim a judgment against the plaintiff, recovered in an action for a tort. (*Taylor v. Root*, 4 Keyes, 335). In an action for a penalty, no counter-claim can be set up. (*Nash v. White's Bank of Buffalo*, 13 Wk. Dig. 141; *Denniston v. Trimmer*, 27 Hun, 393). In an action upon a note, a cause of action to recover twice the amount of illegal interest taken upon it, cannot be set up as a counter-claim. (*National Bank of Auburn v. Lewis*, 81 N. Y. 15). When an agent has converted the property of the principal in his hands, the principal may, in an action on contract, brought against him by the agent, waive the tort, and claim, as upon a contract, for the value of the property. (*Coit v. Stewart*, 50 N. Y. 17). In an action by one bank against another, for a balance of a deposit due the plaintiff, the defendant may set up as a counter-claim, a demand for money fraudulently obtained from it, by a conspiracy between the plaintiff and another, who is not a party; he is permitted to waive the tort and proceed upon an

implied contract to repay; and that contract is held to be joint and several, like the tort. (*City National Bank v. National Park Bank*, 32 Hun, 105). If the cause of action sought to be set up as a counter-claim is not properly available as such, the plaintiff does not waive his right to take the objection at the trial by replying or failing to demur. (*Dinan v. Concys*, 143 N. Y. 544). The question of its propriety may be raised, however, on a demurrer thereto, which specified the objection "that said counter-claim is not of the character specified in section five hundred and one of the code of civil procedure" (*Eckert v. Gallicn*, 40 App. Div. 525), or that "it is insufficient in law." (Co. Civ. Proc. § 494; *Newton v. Lee*, 139 N. Y. 332).

Sec. 2. Rules for the Allowance of Counter-claims.

Subdivision 1.—AGAINST ASSIGNEES OF CONTRACTS.

If the action is founded upon a contract, which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand, existing against the party thereto, or an assignee of the contract, at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counter-claim, to the amount of the plaintiff's demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him. (Co. Civ. Proc. § 502, subd. 1). Both debts must have been due and payable at the same time, and before the change in ownership of either. It is the condition or state of the demands at the time, which is to be looked at, and not any special rule or regulation touching the situation of the debtor or creditor, which prevents him from then bringing suit upon the demand, or requires something as a prerequisite; it is not therefore, necessary that the action could have been maintained at the time upon the debts. (*Taylor v. Mayor, etc.*, 82 N. Y. 10). Where a banker held an overdue note of the defendant, when the defendant made a deposit with him, taking a certificate of deposit, which was payable upon demand, and subsequently

the banker made an assignment for the benefit of creditors, and the assignee brought an action on the note; it was held that the amount of the deposit might be set off against the note, although no demand for payment of the deposit had been made. (*Seymour v. Dunham*, 24 Hun, 93). The demand sought to be set off must have been due before the assignment. (*Martin v. Kunsmuller*, 37 N. Y. 396; *Fera v. Wickham*, 135 N. Y. 223). In an action by an assignee, for damages for breach of contract to sell goods to the assignor, the defendant cannot set up as a counter-claim, a judgment against the assignor, for the purchase price of goods recovered after the assignment, although the action was brought before the assignment. (*Lucas v. East Stroudsburg Glass Co.*, 38 Hun, 581). It has been held that an action on a statutory undertaking given in the course of an action, such as an undertaking on appeal or for a provisional remedy, was not one upon a "contract" within the meaning of subdivision one of section five hundred and two of the code of civil procedure (*Furber v. McCarthy*, 54 Hun, 435); but this case has been overruled and a counter-claim is now allowed to the defendant in actions on these undertakings. (*Bien v. Freund*, 26 App. Div. 202; *Delaney v. Miller*, 78 Hun, 18). Where the defendant executed a bond to the plaintiff's testator, conditioned to pay a certain sum to the executor after the testator's death, it was held that the debt due from the defendant to the testator in his lifetime, could not be set up as a counter-claim in an action to foreclose the mortgage given to secure the bond, and for a deficiency, because the demand in suit could never have been the subject of an action by and in the name of the testator. (*Patterson v. Patterson*, 59 N. Y. 574, 581). An unliquidated claim against an assignor cannot be set off under this section (*Frick v. White*, 57 N. Y. 103); but if the two claims are connected, a set-off will be allowed in equity although one is unliquidated, if, because of the insolvency of either party, satisfaction could not otherwise be obtained. (*Littlefield v. Albany Co. Bank*, 97 N. Y. 581). It is otherwise, however, if the demands are not connected. (*Keep v. Lord*, 2 Duer, 78).

If a set-off is not allowable at law, but there are equitable circumstances which would entitle the defendant to it, he may set them up in the answer, and invoke the equitable power of the court. (*Jordan v. National Shoe & Leather Bank*, 74 N. Y. 467). It must be recognized, however, that such a set-off is not by virtue of the statute.

Subdivision 2.—AGAINST TRANSFERREE OF PAST DUE
NOTE.

If the action is upon a negotiable promissory note, or bill of exchange, which has been assigned to the plaintiff after it became due, a demand, existing against a person who assigned or transferred it, after it became due, must be allowed as a counter-claim, to the amount of the plaintiff's demand, if it might have been so allowed against the assignor, while the note or bill belonged to him. (Co. Civ. Proc. § 502, subd. 2).

Subdivision 3.—WHERE A PARTY SUES OR DEFENDS IN A
REPRESENTATIVE CAPACITY.

If the plaintiff is a trustee for another, or if the action is in the name of a plaintiff, who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counter-claim; but so much of a demand, existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counter-claim, if it might have been so allowed, in an action by the person beneficially interested. (Co. Civ. Proc. § 502, subd. 2). In an action against an executor, or an administrator, or other person sued in a representative capacity, the defendant may set forth as a counter-claim, a demand belonging to the decedent, or other person whom he represents, where the person so represented would have been entitled to set forth the same in an action against him. (Co. Civ. Proc. § 505). In an action brought by an executor or administrator in his representative capacity, a demand against the decedent, belonging, at

the time of his death to the defendant, may be set forth by the defendant as a counter-claim, as if the action had been brought by the decedent in his lifetime; and, if a balance is found to be due to the defendant, judgment must be rendered therefor against the plaintiff in his representative capacity. Execution can be issued upon such a judgment, only in a case where it could be issued upon a judgment, in an action against the executor or administrator. (Co. Civ. Proc. § 506). In an action by the receiver of a bank, to recover money due to the bank, the defendant may counter-claim a debt due from the bank to him (*Pendergast v. Greenfield*, 40 Hun, 494); unless the receiver represents only the creditors of the bank. (*Osgood v. Ogden*, 4 Keyes, 70). One who is indebted to an estate which is in the hands of a receiver, may, in an action against him for the debt, counter-claim the value of services rendered by him for the benefit of the estate, on the employment of the receiver. (*Davis v. Stover*, 58 N. Y. 473). An allegation that the assignment to the plaintiff was merely nominal and without consideration, and was made and accepted with the fraudulent purpose of enabling the assignor to take the proceeds, exempt from the claims of his creditors, is not sufficient to make the plaintiff a trustee, within this subdivision, so that the claim against the assignor may be set up as a counter-claim. (*Willover v. First Nat'l Bank of Olean*, 40 Hun, 184). In an action against an executor on a contract, he can counter-claim the value of the services of his testator, rendered to the plaintiff. (*Smith v. Randall*, 3 T. & C., 798). In an action by an executor, on a cause of action which arose after the death of his testator, the defendant cannot set up as a counter-claim a debt from the testator to him (*Thompson v. Whitmarsh*, 100 N. Y. 35); but he may set up a claim against the executor for the funeral expenses of the testator. (*Patterson v. Patterson*, 59 N. Y. 574). In an action by an administrator, to recover from a bank a deposit due to the decedent in his lifetime, the defendant cannot counter-claim a claim against the decedent, which did not become due until after his death. (*Jordan v. Nat'l Shoe & Leather Bank*, 74 N. Y. 467).

That case was decided under the code of procedure; and the question was raised, but not decided, whether section five hundred and six of the code of civil procedure had affected a change in the law. It seems that the law has not been changed, because if the action had been brought by the decedent in his lifetime, the executor or administrator, instead of being the original plaintiff, would have become the plaintiff by substitution; and by the terms of subdivision two of section five hundred and one of the code of civil procedure, the defendant's demand, when it matured, could not have been interposed as a counter-claim. (*Heidelberg v. Kilpatrick*, 3 Civ. Proc. Rep. 209, note on page 226; *Jaeger v. Bowery Bank*, 8 Misc. 150; *Peyman v. Bowery Bank*, 14 App. Div. 432). In an action by the administratrix to recover a debt due the estate, the defendant cannot set up as a counter-claim, his distributive share of the estate as next of kin. (*Woodhouse v. Woodhouse*, 11 Wk. Dig. 241).

Subdivision 4.—IN ACTIONS FOR DIVORCE OR SEPARATION.

Where an action is brought by either husband or wife, for divorce or separation, as prescribed in either article 2 or 3 of chapter 15, of the code of civil procedure, a cause of action against the plaintiff and in favor of the defendant, arising under either of said articles, may be interposed, in connection with a denial of the material allegations of the complaint, as a counter-claim. (Co. Civ. Proc. § 1770).

Subdivision 5.—IN ACTIONS BY THE PEOPLE.

The state by coming into court as a plaintiff, does not subject itself to affirmative relief, and no set-off or counter-claim can be maintained against it. (*People v. Dennison*, 84 N. Y. 272).

Sec. 3. When Should Be Plead.

Subdivision 1.—WHEN TO BE PLEADED.

The defendant is not bound to set up a counter-claim, consisting of a cause of action, independent of that con-

tained in the complaint. (*Brown v. Gallaudet*, 80 N. Y. 413). He may elect to enforce it in a subsequent action. (*Inslee v. Hampton*, 8 Hun, 230). But if he does plead it as a counter-claim and afterwards sues on it, he will be required to elect in which action he will insist upon it. (*Wiltsie v. Northam*, 3 Bosw. 162). If the matter relied on as a counter-claim, is directly involved in the plaintiff's action, so that the recovery there is decisive of it, it must be set up, and a separate action cannot be brought upon it. (*Nemetty v. Naylor*, 63 How. Pr. 387; *affd.* 100 N. Y. 562; *Dunham v. Bower*, 77 N. Y. 76).

Subdivision 2.—HOW PLEADED.

It must be pleaded as a counter-claim, if it is relied upon as such. (*Equitable Life Assn. Soc. v. Cuyler*, 75 N. Y. 511; *Simmons v. Kayser*, 43 Super. 131). An answer will not be regarded as a counter-claim, if it asks that a certain sum may be set off against any sum allowed to the plaintiff (*American D. & I. Co. v. Staley*, 40 Super. 539); nor if the defendant set up damages by non-performance by the plaintiff of the contract sued on, and asks only to recoup such damages, against any recovery of the plaintiff. (*Cockerill v. Loonam*, 36 Hun, 353, note). It is not necessary that the counter-claim be expressly denominated as such; though it is called a "further and separate answer and defense," it will still constitute a counter-claim where the allegations are solely appropriate to a counter-claim, and the relief demanded shows that it was intended as a counter-claim (*McCrea v. Hopper*, 35 App. Div. 572; *affd.* on opinion below, 165 N. Y. 333). All the facts showing the counter-claim to be a proper one must be pleaded—as, for example, that it existed at the time of the commencement of the action, or that it arose out of the transaction set forth in the complaint, etc. The defendant may interpose as many counter-claims as he has, whether they are legal or equitable. (Co. Civ. Proc. § 507). Each defense or counter-claim must be separately stated, and numbered. (*Id.*).

Subdivision 3.—EFFECT OF PLEADING COUNTER-CLAIM.

A counter-claim, which is pleaded and passed upon, is a bar to another action for the same cause (*Jones v. McGee*, 7 Wk. Dig. 97) ; although no affirmative relief was rendered on it. (*Inslee v. Hampton*, 11 Hun. 156). If the counter-claim is withdrawn before or at the trial, a subsequent action may be brought on it. (*Watson v. Cowdrey*, 23 Hun, 169). If the defendant after pleading a counter-claim, obtains a non-suit as to the plaintiff's cause of action, he in effect submits to a non-suit as to the counter-claim, unless it was a claim which he was bound to present and litigate in the action (*Mayor, etc. v. Ketchum*, 67 How. Pr. 161) ; but if the defendant moves for a non-suit, the plaintiff may still insist that the issues raised by the counter-claim, shall be submitted to the jury. (*Miller v. Freeborn*, 4 Robt. 608). A counter-claim is not a defense, and hence cannot be stricken out as sham. (*Fettretch v. McKay*, 47 N. Y. 426; *Baum's Castorine Co. v. Thomas*, 92 Hun, 1).

Sec. 4. Judgments on the Counter-claim.

In an action upon contract, where the complaint demands judgment for a sum of money only, if the defendant, by his answer does not deny the plaintiff's claim, but sets up a counter-claim amounting to less than the plaintiff's claim, the plaintiff, upon filing with the clerk an admission of the counter-claim, may take judgment for the excess as upon a default for want of an answer. The admission must be made a part of the judgment roll. (Co. Civ. Proc. § 512). Where a counter-claim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff. Where part of the excess is not due from the plaintiff, the judgment does not prejudice the defendant's right to recover, from another person, so much thereof as the judgment does not cancel. (Co. Civ. Proc. § 503).

ARTICLE VI.

DEMAND OF RELIEF.

If the defendant asks simply to defeat the plaintiff's cause of action, he need not insert in the answer any prayer for relief. Where the defendant deems himself entitled to an affirmative judgment against the plaintiff, by reason of a counter-claim interposed by him, he must demand the judgment in his answer. (Co. Civ. Proc. § 509). Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant who requires such a determination, must demand it in his answer. (Co. Civ. Proc. § 521). The defendant can have no affirmative relief, if he does not ask for it in the answer (*Shute v. Hamilton*, 3 Daly, 462), even though there be an allegation of damages. (*McElwre Mfg. Co. v. Trowbridge*, 68 Hun, 28; *affd.* by default without opinion, 142 N. Y. 679). Where a defendant who has been brought in as a claimant of the fund involved in the litigation, makes no affirmative claim against the plaintiff, but asks that the fund be awarded him, this does not constitute a demand for affirmative relief within section five hundred and nine. (*Drake v. Satterlee*, 41 N. Y. St. Rep. 576). In an action of ejectment if the defendant alleges an equitable title and right to a conveyance, he must, to defeat a recovery by the plaintiff, make in his answer a claim for affirmative relief. (*Dewey v. Hoag*, 15 Barb. 365). He can recover no more or greater relief than he demands in his answer, (*Annis v. Upton*, 66 Barb. 370).

CHAPTER XII.

THE REPLY.

ARTICLE I....When to be served.

ARTICLE II....What to contain.

ARTICLE III...Judgment on failure to reply. .

ARTICLE I.

WHEN TO BE SERVED.

Where the answer contains a counter-claim, the plaintiff, if he does not demur, may reply to it. (Co. Civ. Proc. § 514). Where an answer contains new matter, constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter. In that case, the reply, and the proceedings upon failure to reply, are subject to the same rules as in the case of a counter-claim. (Co. Civ. Proc. § 516). Where the answer contains no counter-claim, a reply cannot be served, unless it is ordered pursuant to section five hundred and sixteen of the code, and it will be stricken out on motion. (*Devlin v. Bevins*, 22 How. Pr. 290; *Dillon v. Sixth Ave. R. R. Co.*, 46 Super. 21). When it is doubtful whether a counter-claim is intended to be set up in an answer, the safer course is to serve a reply (*Teets v. Throckmorton*, 8 N. Y. St. Rep. 897), and it will not be stricken out where it does no harm to the defendant. (*Id.*; *Stegman v. Hollingsworth*, 16 N. Y. Supp. 820). In an action for a divorce on the ground of adultery, an answer setting up the adultery of the plaintiff, and asking for a divorce from him, pleads a counter-claim, and requires a reply. (*Leslie v. Leslie*, 11 Abb. Pr. N. S. 311). New matter does not require a reply, unless it is set up as a

counter-claim. (*Equitable Life Assn. Soc. v. Cuyler*, 75 N. Y. 511; *Ward v. Comegys*, 2 How. Pr. N. S. 428). The following defenses have been held not to require a reply: set-off (*American D. & I. Co. v. Staley*, 40 Super. 539; *Hatzel v. Hoffman House*, 2 App. Div. 120; *Farrell v. Amberg*, 8 Misc. 220; *affd. without op.*, 151 N. Y. 670); discharge of the defendant in bankruptcy (*Argall v. Jacobs*, 87 N. Y. 110); in an action of trespass, an answer that the defendant was the owner of the *locus in quo* (*Argotsinger v. Vines*, 82 N. Y. 308); in an action to foreclose a mortgage, an answer that the mortgage was usurious, and praying that it be delivered up and canceled. (*Equitable Life Assn. Soc. v. Cuyler, supra*). A defense made by way of new matter, not constituting a counter-claim, is deemed controverted, and plaintiff without replying, may traverse or avoid it, and is entitled to the benefit of every possible answer to it, the same as if pleaded, and for that purpose evidence admissible under the principles of either law or equity, takes the place of pleading. (*Arthur v. Homestead Fire Ins. Co.*, 78 N. Y. 462). In such a case the court has a discretion, upon the defendant's motion, to order a reply in order to prevent a surprise upon the trial and narrow the issue. (*Cauchois v. Proctor*, 79 Hun, 388; *Mercantile Nat. Bk. v. Corn Ex. Bk.*, 73 Hun, 78). A reply to new matter will not be directed when the only purpose sought in having such reply served is to relieve the defendant from the necessity of proving the facts which he sets up in his answer as a defense by way of avoidance. (*Masters v. DeZavala*, 48 App. Div. 269). When a counter-claim has not been interposed, a reply cannot be ordered nor the defendant required to receive it on the plaintiff's application. (*McDonald v. Davis*, 1 Law Bull. 20). Where a counter-claim has been interposed, the court has no authority to order a reply to be served. (*Adams v. Roberts*, 1 Civ. Proc. Rep. 204). By replying to an answer containing a counter-claim, the plaintiff waives any objection to the form of the pleading, or to the introduction of evidence to prove the counter-claim (*Ayres v. O'Farrel*, 10 Bosw. 143; *Thomas v. Loaners' Bank*, 38 Super. 466); but he does not waive

the objection that the counter-claim is not allowable in that action. (*Smith v. Hall*, 67 N. Y. 48; *Dinan v. Coneys*, 143 N. Y. 544). If the reply is served without an order, to an answer not setting up a counter-claim, the irregularity is waived by its acceptance, without a motion to strike it out. (*Wilkin v. Raplee*, 5 Wk. Dig. 560).

ARTICLE II.

WHAT TO CONTAIN.

The reply must contain a general or specific denial of each material allegation of the counter-claim, controverted by the plaintiff, or of any knowledge or information thereof, sufficient to form a belief; and it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint, constituting a defense to the counter-claim. (Co. Civ. Proc. § 514). A reply may contain two or more distinct avoidances of the same defense or counter-claim; but they must be separately stated and numbered. (Co. Civ. Proc. § 517). The reply is substantially an answer to the counter-claim, and it is governed by the same rules as the answer. It must be distinct, and specific, so that the defendant and the court may see clearly what is controverted. (*Risley v. Carll*, 1 Law Bull. 52). A reply denying each and every allegation set up in the answer as new matter by way of avoidance, is sufficient. (*Chauviteau v. Fay*, 54 How. Pr. 211). A reply to a plea of the statute of limitations, should show whether the action was begun within the time required by law, or whether the running of the statute was suspended. An allegation that the action was commenced within six years, is not sufficient. (*Jarris v. Pike*, 11 Abb. Pr. N. S. 398). The pendency of a prior action upon the cause of action set up as a counter-claim must be set up in the reply, if such pendency does not appear upon the face of the counter-claim. (Co. Civ. Proc. §§ 495, 514; *Ansorge v. Kaiser*, 22 Abb. N. C. 305; *Dolbeer v. Stout*, 30 Abb. N. C. 693). A denial in a reply, on information and belief, of an allegation of

a counter-claim, is insufficient, if it appears by the complaint, that such allegations are within the plaintiff's knowledge. (*Fallon v. Durant*, 60 How. Pr. 178). Where there is set forth in a reply new matter inconsistent with the allegations of the complaint, the defendant may have such inconsistent matter stricken out on motion. (*Frank Brewing Co. v. Hammersen*, 22 App. Div. 476). A new assignment is not admissible in a reply (*Stewart v. Wallis*, 30 Barb. 344); nor can the reply be used for the purpose of amending the complaint. (*Eidlitz v. Rothschild*, 87 Hun, 243). It was held in *Miller v. Losee* (9 How. Pr. 356), that a reply could set up a counter-claim to the counter-claim alleged in the answer; but it will be noticed that section five hundred and fourteen above cited, does not in terms permit a counter-claim to be set up and the case seems against the current of the later authorities. It may now be safely asserted that the reply cannot set up a counter-claim on a counter-claim. (*Windecker v. M. L. I. Co.*, 12 App. Div. 73, 81, 82; *Cohn v. Husson*, 66 How. Pr. 150; *Hatfield v. Todd*, 13 Civ. Proc. 265; *Goosen v. Goosen*, 11 Misc. 86). In case the plaintiff has a cause of action against the defendant, other than that set up in the complaint, which he desires to litigate in the one action, the proper procedure is to amend his complaint. An objection that the counter-claim is barred by the statute of limitations is waived, if not set up in the reply. (Co. Civ. Proc. § 413).

ARTICLE III.

JUDGMENT ON FAILURE TO REPLY.

If the plaintiff fails to reply or demur to the counter-claim, the defendant may apply, upon notice, for judgment thereupon; and, if the case requires it, a reference may be ordered, or a writ of inquiry may be issued, as prescribed in chapter XI of this act, where the plaintiff applies for judgment. (Co. Civ. Proc. § 515). If not replied to, a counter-claim is taken as true. (*Clin-ton v. Eddy*, 1 Lans. 61). The plaintiff by not replying,

admits that the matters set up in the counter-claim are due and owing; but, if defendant does not take advantage of that admission, and attempts to make proof of the facts alleged in his counter-claim, he waives it; and, if the facts proved fail to show that the counter-claim was a proper set-off, it will not be allowed. (*Randolph v. Mayor etc.*, 53 How. Pr. 68). A defendant waives the reply, although it is necessary, if the trial proceeds without the objection that no reply was served and upon the theory that the allegations of the counter-claim are in issue. (*Hopkins v. Lane*, 2 Hun, 38; *affd.* 87 N. Y. 501; *Jordan v. Nat'l Shoe & Leather Bank*, 74 N. Y. 467). Although the plaintiff has not replied, he may bring the case to trial, and the defendant can then assert whatever rights he may have by reason of the failure to reply. (*Adams v. Roberts*, 1 Civ. Proc. Rep. 304). Although the plaintiff does not reply, he may still insist that the facts set up in the answer do not constitute a set-off. (*Jordan v. Nat'l Shoe & Leather Bank*, *supra*).

CHAPTER XIII.

DEMURRER.

ARTICLE I....When it lies.

ARTICLE II....Form and effect of the demurrer.

ARTICLE III....Grounds of demurrer to the complaint.

ARTICLE IV....Grounds of demurrer to pleadings after complaint

ARTICLE V....Amendments after demurrer.

ARTICLE VI....When objections taken by answer.

ARTICLE VII..When objection is waived.

ARTICLE I.

WHEN IT LIES.

A demurrer is an objection to the legal sufficiency of the pleading demurred to. The object of the demurrer under the code is the same as at common law, although its scope has been changed. It still goes to the legal effect of the pleading demurred to, for some defect or deficiency apparent upon its face. It denies the legal proposition involved in such pleading and this makes an issue of law. Special demurrers, however, as known to the former practice, have no place in the present system of pleading. The code authorizes a demurrer for specific causes, and no pleading is demurrable unless it is subject to one or more of the objections, specified in the section defining the grounds of demurrer. (*Marie v. Garrison*, 83 N. Y. 14, 23). The demurrer can only be taken, when the defects complained of appear upon the face of the pleading. (*DePuy v. Strong*, 37 N. Y. 372).

The defendant may demur to the complaint, where one or more of the following objections thereto appear upon the face thereof:

1. That the court has not jurisdiction of the person of the defendant.

2. That the court has not jurisdiction of the subject of the action.

3. That the plaintiff has not legal capacity to sue.

4. That there is another action pending between the same parties, for the same cause.

5. That there is a misjoinder of parties plaintiff.

6. That there is a defect of parties, plaintiff or defendant.

7. That causes of action have been improperly united.

8. That the complaint does not state facts sufficient to constitute a cause of action. (Co. Civ. Proc. § 488).

The defendant may demur to the whole complaint, or to one or more separate causes of action, stated therein. In the latter case, he may answer the causes of action not demurred to. (Co. Civ. Proc. § 492). The defendant may also demur to the reply, or to a separate traverse to, or avoidance of, a defense or counter-claim, contained in the reply, on the ground that it is insufficient in law, upon the face thereof. (Co. Civ. Proc. § 493). The plaintiff may demur to a counter-claim or a defense consisting of new matter, contained in the answer, on the ground that it is insufficient in law upon the face thereof. (Co. Civ. Proc. § 494).

The plaintiff may also demur to a counter-claim, upon which the defendant demands an affirmative judgment, where one or more of the following objections thereto appear upon the face of the counter-claim :

1. That the court has not jurisdiction of the subject thereof.

2. That defendant has not legal capacity to recover upon the same.

3. That there is another action pending between the same parties, for the same cause.

4. That the counter-claim is not of the character specified in section 501 of the code of civil procedure.

5. That the counter-claim does not state facts sufficient to constitute a cause of action. (Co. Civ. Proc. § 495).

A demurrer can only be interposed upon one or more of the grounds specified in these sections, and for

a defect which affects a substantial right. (*Ayers v. Lawrence*, 59 N. Y. 192). It will not lie for merely formal defects (*Kain v. Larkin*, 141 N. Y. 144); as for irrelevancy (*Bostwick v. Dry Goods B'k*, 67 Barb. 449); for redundancy (*Ward v. Ward*, 5 Abb. Pr. N. S. 145); nor because the pleading is indefinite or uncertain (*Hale v. Omaha Nat'l B'k*, 49 N. Y. 626; *Moffitt v. McLaughlin*, 13 Hun, 449); nor because causes of action are not separately stated or numbered (*Bass v. Comstock*, 38 N. Y. 21); nor for misnomer (*Gannon v. Myers*, 11 Civ. Proc. Rep. 187); nor will it lie for a mere clerical error (*Roussel v. St. Nicholas Ins. Co.*, 41 Super. 279; *Marshall v. Bresler*, 1 How. Pr. N. S. 217); nor to the prayer for relief (*Mackey v. Auer*, 8 Hun, 180); nor will a demurrer lie to a defect which appears only by an examination of the jurat. (*State B'k v. Shaw*, 5 Hun, 114). An objection that the claim is stale cannot be raised by demurrer. (*Sage v. Culver*, 147 N. Y. 214). A demurrer will not lie for any formal defect, which might have been the ground of special demurrer at common law. (*Yates v. Burch*, 13 Hun, 622). It cannot be interposed upon the ground that the cause of action is barred by the statute of limitations, although that appears upon the face of the complaint. (*Sands v. St. John*, 36 Barb. 628; *affd.* 29 How. Pr. 574, note). Neither is a complaint, which fails to conform to section 1775 of the code of civil procedure by stating whether the defendant is a domestic or foreign corporation, demurrable for that defect. (*Harmon v. Vanderbilt Hotel Co.*, 79 Hun, 392; *affd.* without opinion, 143 N. Y. 665). A demurrer will not lie for a misjoinder of parties defendant. (*Fish v. Hose*, 59 How. Pr. 238). There seems to be a conflict of authority, as to whether a demurrer may be interposed to a pleading because it is hypothetical. In the case of *Taylor v. Richards* (9 Bosw. 679), it was held that a demurrer could not be interposed to a pleading upon that ground; but the later case of *Mann v. Milne* (21 Hun, 408), holds that the proper remedy against a hypothetical answer is a demurrer; and that view seems to be sustained by the case of *Goodman v. Robb* (41 Hun, 605). The question

whether a denial of knowledge and information is sufficient, cannot be raised by demurrer. (*Nichols v. Lumpkin*, 51 Super. 88). A supplemental complaint cannot be demurred to (*Fleischmann v. Bennett*, 1 Law. Bull. 43), unless it has been pleaded in place of the original complaint; but a demurrer may be interposed to the original and supplemental complaint taken together. (*Taylor v. Metropolitan Elevated R. R. Co.*, 52 Super. 299, 562; *Harris v. Elliott*, 29 App. Div. 568). A demurrer will only lie to the whole of the cause of action or defense; and not to a separate paragraph of a pleading. (*Lord v. Vreeland*, 15 Abb. Pr. 122; *Hackley v. Draper*, 4 T. & C. 614; *Hollingsworth v. Spectator Co.*, No. 1, 53 App. Div. 291). If a party desires to interpose a demurrer to the matter contained in a single paragraph, claiming that it constitutes a separate cause of action or defense, the proper procedure is first to move that the pleader be compelled to state and number it separately and then, after it has been so stated, demur. (*N. J. Steel & Iron Co. v. Robinson*, 60 App. Div. 69).

ARTICLE II.

FORM AND EFFECT OF THE DEMURRER.

SECTION

1. Form.
2. When joined with answer.
3. Effect.

Sec. 1. Form.

The demurrer must distinctly specify the objections to the complaint; otherwise it may be disregarded. An objection taken under subdivision first, second, fourth or eighth of section four hundred and eighty-eight (Co. Civ. Proc.) may be stated in the language of the subdivision; an objection, taken under either of the other subdivisions, must point out specifically the particular defect relied on. (Co. Civ. Proc. § 490). A demurrer, taken to a counter-claim, must distinctly specify the objections, otherwise it may be disregarded. The mode of specifying the objections is the same, as where a

demurrer is taken to a complaint. (Co. Civ. Proc. § 496). The demurrer may be interposed to the whole pleading, or to one or more separate causes of action or defenses. (Co. Civ. Proc. §§ 492, 493, 494). But it must be to the whole pleading, or to the whole of one or more causes of action or defenses. (*Hackley v. Draper*, 4 T. & C. 614). The grounds upon which the demurrer is taken, must all be distinctly specified, and it cannot be sustained upon a ground not clearly stated. (*Carter v. DeCamp*, 40 Hun, 258). Any objection appearing upon the face of the pleading, and not specified in the demurrer, is deemed to be waived, except the objection to the jurisdiction of the court or the objection that the complaint fails to state a cause of action. (Co. Civ. Proc. §§ 498, 499; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648, 651). If there are several causes of action or defenses united in a pleading, a demurrer to the whole pleading will be overruled, if any one of them is good (*Hale v. Omaha Nat'l Bk.*, 49 N. Y. 626); although the causes of action or defenses are not separately stated or numbered. (*Seaver v. Hodgkin*, 63 How. Pr. 128). If there are several plaintiffs, and a single demurrer is interposed as to all, and there is a good cause of action stated in favor of one separately, the demurrer will be overruled. (*Peabody v. Washington Co. Mut. Ins. Co.*, 20 Barb. 339). So, if several defendants unite in a joint demurrer, it cannot be sustained, if the complaint states a good cause of action as to one. (*Oakley v. Tugwell*, 33 Hun, 357). If a defendant desires to object that there is a misjoinder of causes of action, because the complaint is not sufficient as to one plaintiff, he must specify the plaintiff as to whom he claims it is insufficient. (*Richtmyer v. Richtmyer*, 50 Barb. 55). A demurrer to part of a pleading, should specify the part demurred to. (*Jarvis v. Palmer*, 11 Paige, 650). Separate demurrers may be interposed to several causes of action or defenses. (*Ogdensburgh Bank v. Paige*, 2 Co. Rep. 75).

Sec. 2. When Joined with Answer.

If the defendant demurs to one or more separate causes of action, stated in the complaint, he may answer the causes of action not demurred to. (Co. Civ. Proc. § 492). If there are several defendants, some may demur and others may answer. (*Webb v. Vanderbilt*, 39 Super. 4). A demurrer and answer to the same matter is not allowed. (*Munn v. Barnum*, 12 How. Pr. 563). The defendant will be compelled to elect upon which he will rely. (*Spellman v. Weider*, 5 How. Pr. 5; *Bernard v. Morrison*, 4 Law Bull. 90). The answer and demurrer are separate pleadings, and they do not lose their distinct character by being on the same paper. (*Howard v. Mich. South. R. R. Co.*, 5 How. Pr. 206). If the pleading denies anything, or requires proof to establish anything alleged in it, it is an answer and not a demurrer. (*Clark v. Van Deusen*, 3 Co. Rep. 219; *Struwer v. Ocean Ins. Co.*, 16 How. Pr. 422).

Sec. 3. Effect.

A demurrer admits the facts stated in the pleading demurred to. (*Cutler v. Wright*, 22 N. Y. 472). Upon demurrer, the pleading is deemed to admit whatever can be implied from the allegations therein, by reasonable and fair intendment, and facts impliedly averred are admitted in the same manner, as though they were directly averred. (*Marie v. Garrison*, 83 N. Y. 14, 23). A demurrer does not admit conclusions of law. (*Kip v. N. Y. & Harlem R. R. Co.*, 67 N. Y. 227). Averments in the pleading as to the legal effect or meaning of an instrument, that is set out in full in the pleading, are not admitted by the demurrer; nor does the demurrer admit the correctness of inferences drawn from the facts stated; but only the truth of such facts as are properly stated in the pleading. (*Bogardus v. N. Y. Life Ins. Co.*, 101 N. Y. 328, 337). The admission of facts, made by the demurrer, is available not only for the purpose of the argument of the demurrer, but as evidence on the trial of the action, while the demurrer remains upon the record. (*Cutler v. Wright*, 22 N. Y. 472). Upon the argument of the demurrer, all reasonable intendments

are indulged, in support of the pleading demurred to. (*Lorillard v. Clyde*, 86 N. Y. 384). A demurrer searches the record for the first fault in pleading and reaches back to condemn the first pleading that is defective in substance. (*Baxter v. McDonnell*, 154 N. Y. 432, 436; *Corning v. Roosevelt*, 25 Abb. N. C. 220, and note).

ARTICLE III.

GROUND OF DEMURRER TO THE COMPLAINT.

SECTION.

1. That the court has no jurisdiction.
2. That plaintiff has not capacity to sue.
3. Another action pending.
4. Misjoinder of parties plaintiff.
5. Defect of parties.
6. Misjoinder of causes of action.
7. No cause of action.

Sec. 1. That the Court has no Jurisdiction.

The want of jurisdiction is the basis of the first two grounds upon which a demurrer can be taken. (Co. Civ. Proc. § 488, subds. 1 and 2). As we have seen, the objection may be taken in the words of the statute. (Co. Civ. Proc. § 490). The objection that the court has no jurisdiction of the person of the defendant, can be taken only to the complaint, and not to any subsequent pleading. The meaning of that objection is, that it appears by the complaint, that the person of the defendant is not subject to the jurisdiction of the court. The objection cannot be taken simply because of the irregularity of the service of process. (*Nones v. Hope Mut. Life Ins. Co.*, 8 Barb. 541). The objection does not raise any such question. (*O. & L. C. R. R. Co. v. Vermont & Canada R. R. Co.*, 16 Abb. Pr. N. S. 249; *affd.* on other grounds, 4 Hun, 712). Where several causes of action are properly joined, except that the court has no jurisdiction of one of them, the objection must be limited to that one; and must be for want of jurisdiction to the cause of action set out in that count, or it will be disregarded. (*Cook v. Chase*, 3 Duer, 643). In

an action against a foreign corporation, a demurrer for want of jurisdiction is not well taken, unless it appears upon the face of the complaint that the contract sued upon is not within the jurisdiction of the court. (*Fisher v. Charter Oak Life Ins. Co.*, 52 Super. 179). If the action is brought in an inferior court of limited jurisdiction, the complaint must show affirmatively that the court has jurisdiction of the subject of the action, and the person of the defendant, or a demurrer upon that ground will be sustained. (*Frees v. Ford*, 6 N. Y. 176; *Simons v. DeBarc*, 4 Bosw. 547; *Gilbert v. York*, 111 N. Y. 544).

Sec. 2. That Plaintiff has not Capacity to Sue.

This is the third ground of demurrer, stated in section four hundred and eighty-eight of the code of civil procedure. It cannot be taken by using the words of the statute simply. (Co. Civ. Proc. § 490). The specific defect must be pointed out. It is the proper ground of demurrer where a party sues as an officer of an association, without alleging his authority to do so; or as receiver, or executor, or in some other representative capacity, without alleging his appointment. This objection is independent of the objection that the complaint does not state facts sufficient to constitute a cause of action (*Ward v. Petrie*, 157 N. Y. 301); as the facts showing the existence of the capacity to sue, are not necessarily the facts which show the cause of action. (*Bank of Lowville v. Edwards*, 11 How. Pr. 216). To sustain a demurrer upon this ground, it must appear affirmatively that the plaintiff has not the legal capacity to sue; if the complaint is simply silent upon that point, the objection must be taken by answer. (*Phœnix Bank v. Donnell*, 40 N. Y. 410).

Sec. 3. Another Action Pending.

This ground of demurrer is, that there is another action pending between the same parties for the same cause. (Co. Civ. Proc. § 488, subd. 4). It may be stated in the words of the section. (Co. Civ. Proc. § 490). To sustain a demurrer within this subdivision,

it is not necessary that the other action should be what is technically known as a civil action. If it appears upon the face of the complaint that any proceeding is pending in which the rights of the plaintiff would be fully protected, although it is a special proceeding, or a proceeding before another court of the state, the demurrer will be sustained (*Groshon v. Lyon*, 16 Barb. 461); although it is one which was begun by the defendant against the plaintiff; but the action must be one between the same parties (*Geery v. Webster*, 11 Hun, 428); in which all the relief sought in the action demurred to could be obtained (*Id.*); for the same cause; it is not sufficient that the same property is in controversy. (*Dawley v. Brown*, 79 N. Y. 390). It must also appear upon the face of the complaint, that the action is one pending in the courts of this state, and not in the courts of the United States, or of any other state. (*Cook v. Litchfield*, 5 Sand. 330; reversed on other grounds, 9 N. Y. 279). In an action to set aside a release for fraud, where it appeared by the complaint that the same release had been set up as a defense in another action, which was then pending, a demurrer for this cause was sustained. (*Dambman v. Schulting*, 4 Hun, 50).

Sec. 4. Misjoinder of Parties Plaintiff.

The fifth ground of demurrer to the complaint is that there is a misjoinder of parties plaintiff. (Co. Civ. Proc. § 488, subd. 5). Under the code of procedure, a demurrer could not be taken upon this ground. (*People v. Crooks*, 53 N. Y. 648). But that case, and other cases to the same effect, are not the law since the code of civil procedure took effect. The nature of the misjoinder must be stated, and it is not sufficient to state the ground of demurrer in the words of the code. A demurrer for this ground is properly taken, where it appears upon the face of the complaint that one plaintiff has no interest with the others in the cause of action (*Berney v. Drexel*, 33 Hun, 419, 421; *Havana City Ry. Co., v. Ceballos*, 49 App. Div. 263); or where the plaintiffs seek relief upon two separate or distinct contracts, in which they are not jointly interested

(*Juliano Ware Co. v. Sands*, Daily Reg., Feb. 4, 1881); or where it appears that the interests of the plaintiffs under a contract sued upon are several and distinct. The misjoinder of parties plaintiff is not a ground of demurrer as to all the plaintiffs, if either has a good cause of action. (*Simar v. Cassady*, 53 N. Y. 298; *Enos v. Leach*, 18 Hun, 139).

Sec. 5. Defect of Parties.

A demurrer may be taken to the complaint upon the ground that there is a defect of parties plaintiff, or defendant. (Co. Civ. Proc. § 488, subd. 6). A demurrer upon this ground must specify the names of the parties who should be joined. (*Anderton v. Wolf*, 41 Hun, 571, 572). The defect must appear upon the face of the pleading. (*Haines v. Hollister*, 64 N. Y. 1). Where it is apparent, the objection must be taken by demurrer (*Straus v. Tradesmen's Nat'l Bank*, 36 Hun, 451; or it is waived (Co. Civ. Proc. § 499; *Selye v. Zimmer*, 15 N. Y. Supp. 881; affd. without opinion, 137 N. Y. 563); although the names of the absentees are not stated in the pleading. (*Hees v. Nellis*, 1 T. & C. 118). This objection must always be taken by demurrer, unless evidence is required to make the defect apparent. (*Id.*). There has been some conflict of authority, whether a demurrer for this ground could be sustained, unless it appears affirmatively upon the face of the complaint that the party absent is living. In *Strong v. Wheaton* (38 Barb. 616), it was held that it could not; and it has been held that it is not enough that the complaint is silent upon that subject. (*Brainard v. Jones*, 11 How. Pr. 569; *Scofield v. Van Syckle*, 23 How. Pr. 97). But later cases seem to have settled the rule the other way, and it may now be stated that a demurrer lies upon this ground, unless it appears upon the face of the pleading that the absent parties are not living. (*Eaton v. Balcom*, 33 How. Pr. 80; *Sanders v. Village of Yonkers*, 63 N. Y. 489, 493; *Zabriskie v. Smith*, 13 N. Y. 322; *Green v. Lippincott*, 53 How. Pr. 33; *Sullivan et al. v. N. Y. & R. Co.*, 119 N. Y. 348). A demurrer under this subdivision, will not lie for an excess of parties defend-

ant, but only for a deficiency. (*N. Y. & N. Haven R. R. Co. v. Schuyler*, 17 N. Y. 592). One defendant cannot demur for a defect of parties defendant, unless he has an interest in having the absentee made a defendant. (*Ander-ton v. Wolf*, 41 Hun, 571). A demurrer for this ground will not lie, unless the parties omitted are not only proper, but necessary parties. (*Wing v. Bull*, 38 Hun, 291). Nor will it lie, if the court can determine the controversy without prejudice to the rights of the omitted party, or saving their rights. (*Wallace v. Eaton*, 5 How. Pr. 99). Where the complaint alleged that the plaintiff made a contract with a firm, composed of the defendants and others whose names are unknown, but whom when discovered, the plaintiff asks leave to join as defendants, a demurrer will not lie for a defect of parties defendant. (*Earle v. Scott*, 50 How. Pr. 506). If it appears upon appeal from a judgment, that the presence of other parties than those joined is necessary to a complete determination of the controversy, the court will reverse the judgment, although the defect was not raised by demurrer or answer. (*Bear v. American Rapid Tel. Co.*, 36 Hun, 400; *Moulton v. Cornish*, 138 N. Y. 133).

Sec. 6. Misjoinder of Causes of Action.

The seventh ground of demurrer to the complaint, is that causes of action have been improperly united. (Co. Civ. Proc. § 488, subd. 7). The right to demur for misjoinder is not lost, because the several causes of action are not separately stated. (*Wiles v. Suydam*, 64 N. Y. 173; *Zorn v. Zorn*, 38 Hun, 67). If they might have properly been joined, the remedy for the failure to separately state them is by a motion, and not by demurrer. (*Bass v. Comstock*, 38 N. Y. 21). A demurrer for this cause should be to the whole complaint, and not to any separate cause of action therein stated. (*Ferriss v. N. A. F. Ins. Co.*, 1 Hill, 71). It should specify the causes of action which are improperly united. (*Ander-ton v. Wolf*, 41 Hun, 571). Where the plaintiffs have been induced by fraud to execute a joint release of separate claims, it is not a misjoinder of causes of

action, because in addition to the prayer that the release be set aside, they ask judgment separately for the amounts due to each. (*Smith v. Schulting*, 14 Hun, 52). Where the complaint alleges a cause of action at law, and one in equity, it is not therefore a misjoinder. (*Lattin v. McCarty*, 41 N. Y. 107; *Carter v. DeCamp*, 40 Hun, 258). The fact that two kinds of relief are asked, does not necessarily make two causes of action. (*Lattin v. McCarty*, *supra*). In an action in the nature of a creditor's bill against several judgment debtors, to reach property owned by them in severalty, a demurrer for this ground will not lie. (*Bradner v. Holland*, 33 Hun, 288). Where two causes of action on contract are joined in the complaint, but all the defendants are not affected by both, a demurrer for misjoinder lies at the instance of the defendant who is so affected. (*Nichols v. Drew*, 94 N. Y. 22). A complaint against a president of a corporation, which asked an accounting by the defendant for the property of the corporation in his hands as president, and for plaintiff's property in his hands individually, is demurrable for misjoinder. (*Paulsen v. Van Steenberg*, 65 How. Pr. 342). Where the complaint shows a separate cause of action against each defendant, but not a joint cause of action, a joint demurrer upon this ground is proper. (*Hess v. Buff. & Niagara Falls R. R. Co.*, 29 Barb. 391). Where an action is against a maker and guarantor of a note, and the complaint alleges in one count, a good cause of action against each separately, a demurrer by each defendant for a misjoinder of causes of action is proper. (*Barton v. Speis*, 5 Hun, 60). If there is an attempt to join causes of action which cannot properly be united, the defendant is entitled to judgment upon his demurrer, although one cause of action is not good. (*Higgins v. Crichton*, 11 Daly, 114). A single instance of two misjoined causes of action is sufficient to require a demurrer for misjoinder to be sustained, no matter how many causes of action, properly or improperly joined, the complaint contains. (*Stanton v. M. P. Ry. Co.*, 15 Civ. Proc. Rep. 296). The objection is waived if not taken by demurrer; and defendant cannot ask at

the trial that the plaintiff elect on which cause of action he will seek to recover. (*Gillett v. Borden*, 6 Lans. 219; *Sherman v. Inman Steamship Co.*, 26 Hun, 107).

Sec. 7. No Cause of Action.

The last ground of demurrer in section four hundred and eighty-eight, is that the complaint does not state facts sufficient to constitute a cause of action. This objection may be taken in the words of the code. (Co. Civ. Proc. § 490). It is optional whether the defendant will take this objection by demurrer; it is good at any stage of the action. (Co. Civ. Proc. § 499; *Gould v. Glass*, 19 Barb. 179). An objection to the complaint, upon this ground, will not be sustained for mere formal defects which were the subject of special demurrer. (*Richards v. Edick*, 17 Barb. 260). It is not sufficient that the facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that the material facts are only argumentatively averred. The demurrer can only be sustained when it appears that, admitting all the facts alleged, it presents no cause of action whatever. (*Marie v. Garrison*, 83 N. Y. 14, 23). A complaint is good upon demurrer if it states a cause of action, no matter how much irrelevant or unnecessary matter appears in it. (*Prouty v. Whipple*, 10 Wk. Dig. 387). A demurrer for this cause will not be sustained, if the complaint sets out a cause of action, although not the one intended by the pleader (*Witherhead v. Allen*, 4 Abb. Ct. App. Dec. 628), provided the cause of action set out is one which will entitle the plaintiff to the kind of relief prayed for. (*Swart v. Boughton*, 35 Hun, 281). If there are two counts in the complaint, and either sets out a good cause of action, a demurrer to the whole complaint will be overruled. (*Hale v. Omaha National Bk.*, 49 N. Y. 626). A demurrer will be sustained, where the complaint omits to state any one of the facts necessary to constitute the cause of action (*Van Liew v. Johnson*, 6 T. & C. 648), or where no connection is shown between the cause of action and the party demurring. (*Webb v. Vanderbilt*, 39 Super. 4). If the complaint discloses

a good defense to the cause of action set out in it, a demurrer upon this ground will be sustained. (*Calvo v. Davies*, 73 N. Y. 211.) Where there is no answer, the plaintiff is entitled to no greater relief than that demanded in the complaint; and for that reason, a demurrer on this ground raises the question whether the plaintiff is entitled to any part of the relief demanded; and if he is not entitled to the kind prayed for, a demurrer will be sustained although he may be entitled to some other kind of relief; for instance, if he ask money relief, and is entitled to equitable relief; or if he asks for equitable relief, and is entitled to a judgment at law. (*Fisher v. Charter Oak L. Ins. Co.*, 52 Super. 179; *Swart v. Boughton*, 35 Hun, 281). But where the pleader prays for both equitable and legal relief and he is entitled to one only, a demurrer will not be sustained. (*Wisner v. Consolidated Fruit Jar Co.*, 25 App. Div. 362). If it appears upon the face of a complaint, praying equitable relief only, that the plaintiff has an adequate remedy at law, a demurrer on the ground that the complaint does not state a cause of action will be sustained. (*Jackson v. City of N. Y.*, 34 Misc. 380; Abb. Tr. Br. Pl. §§ 110, 111). In an action against several defendants, a complaint will not be held bad on joint demurrer, if a good cause of action against one is alleged. (*Fish v. Hose*, 59 How. Pr. 238). If the language of the complaint may reasonably import a good cause of action, a demurrer for insufficiency will be overruled, although the complaint is susceptible of a construction excluding such cause of action. (*Olcott v. Carroll*, 39 N. Y. 436; *Patch v. Tribune Ass'n*, 38 Hun, 368). Where two unite in a joint action, and the facts do not show a joint cause of action, a demurrer lies for this cause, although one has a good cause of action, and the judgment should be for the defendant, with leave to the one who has a good cause of action to amend. (*Mann v. Marsh*, 35 Barb. 68). One defendant cannot demur, because the complaint is insufficient against another. (*Littell v. Sayre*, 7 Hun, 485). A demurrer for insufficiency lies where the plaintiff has failed to obtain leave to sue, when that is

requisite. (*Earle v. David*, 86 N. Y. 634; *Freeman v. Dutcher*, 15 Abb. N. C. 431).

ARTICLE IV.

GROUND OF DEMURRER TO PLEADINGS AFTER COMPLAINT.

SECTION.

1. To the answer.
2. To the counter-claim.
3. To reply.

Sec. 1. To the Answer.

The only ground of demurrer to a defense consisting of new matter, contained in the answer, is that it is insufficient in law, upon the face thereof. (Co. Civ. Proc. § 494). A demurrer will not lie to an answer consisting simply of denials, but only to one containing a counter-claim, or a defense consisting of new matter (*Nichols v. Lumpkin*, 51 Super. 88); in case an answer contains denials of material allegations in the complaint, as well as averments of new matter, the demurrer must be confined specifically to the new matter. (*McBride v. Am. Surety Co.*, 70 Hun, 369). It will not lie to a part of an entire defense (*Hollingsworth v. Spectator Co.*, 53 App. Div. 291); but it will lie to what is pleaded as a partial defense, on the ground that it is not sufficient for that purpose (Co. Civ. Proc. § 508), and no other ground. (*Thompson v. Halbert*, 40 Hun, 536, 537; reversed on ground that what was held by the general term to be a partial defense was not pleaded as such, 109 N. Y. 329). It will not lie for mere formal defects. (*Wait v. Ferguson*, 14 Abb. Pr. 379). It seems, however, that the answer may be demurred to, because it is hypothetical (*Mann v. Milne*, 21 Hun, 408; *Goodman v. Robb*, 41 Hun, 605); but not because of irrelevancy or surplusage. (*Fry v. Bennett*, 5 Sand. 54). If an answer which denies nothing, but sets up new matter, is demurred to, all the allegations of the complaint and the answer are taken to be true. (*Long v. Mayor etc.*, 81 N. Y. 425, 427). Any allegation of the complaint

referred to in the answer, is to be considered as incorporated in it, for the purposes of the demurrer. (*Cragin v. Lovell*, 88 N. Y. 258). Upon demurrer to the answer, where affirmative relief is not asked, it is sufficient to state the ground mentioned in section four hundred and ninety-four of the code; and any defect which goes to the merits can be raised. (*Arthur v. Brooks*, 14 Barb. 533). Upon the argument of the demurrer, the question of the sufficiency of the complaint may be raised (*Clark v. Poor*, 73 Hun, 143; *People v. Booth*, 32 N. Y. 397); and if the complaint is not good the demurrer will be overruled. (*Parsons v. Hayes*, 50 Super. 29). A demurrer to an answer, or to any defense in an answer, must be disposed of before the issue of fact is tried. (*Wilson v. Robinson*, 6 How. Pr. 110). A defendant cannot demur to a co-defendant's answer served upon such defendant pursuant to the provisions of section 521 of the code of civil procedure; a demurrer lies only where there is a code provision for it, and none is provided for in such a case. (*Stuart v. Blatchley*, 77 Hun, 425).

Sec. 2. To the Counter-claim.

The plaintiff may also demur to a counter-claim, upon which the defendant demands an affirmative judgment, where one or more of the following objections thereto, appear on the face of the counter-claim:

1. That the court has not jurisdiction of the subject thereof.

2. That the defendant has not legal capacity to recover upon the same.

3. That there is another action pending between the same parties, for the same cause.

4. That the counter-claim is not one of the character specified in section five hundred and one of the code of civil procedure.

5. That the counter-claim does not state facts sufficient to constitute a cause of action. (Co. Civ. Proc. § 495).

A demurrer taken under section four hundred and ninety-five of the code of civil procedure must distinctly

specify the objections to the counter-claim; otherwise it may be disregarded. The mode of specifying the objections is the same, as where a demurrer is taken to a complaint. (Co. Civ. Proc. § 496). A demurrer to a counter-claim must specify the particular objections sought to be raised, or it will be disregarded. (*Safford v. Snedeker*, 67 How. Pr. 264). Under subdivision four of section 495, the objection is sufficiently specified if stated in the language of the subdivision. (*Eckert v. Gallien*, 40 App. Div. 525). Upon the demurrer to the counter-claim, facts alleged in the complaint, not inconsistent with the averments of the counter-claim, are to be taken as true. (*Graham v. Dunnigan*, 6 Duer, 629, 631). Where the demurrer to the counter-claim is taken for insufficiency, the objection cannot be raised that the counter-claim does not set up a cause of action arising out of the contract set forth in the complaint. (*Safford v. Snedeker*, 67 How. Pr. 264). If the counter-claim is not available as such, under the code of civil procedure, the plaintiff does not waive his right to take that objection, by a failure to demur or by replying to the answer (*Dinan v. Coneys*, 143 N. Y. 544); nor by a failure to plead to it at all. (*Lipman v. J. A. I. Works*, 128 N. Y. 58; *Jordan v. Nat. Shoe & Leather Bk.*, 74 N. Y. 467; *Stevens v. Orton*, 18 Misc. 538, 545). The complaint may be attacked, as not stating facts sufficient to constitute a cause of action, upon a demurrer to a counter-claim. (*Village of Little Falls v. Cobb*, 80 Hun, 20).

Sec. 3. To the Reply.

The sole ground of demurrer to the reply, or to a separate traverse to, or avoidance of, a defense or counter-claim, contained in the reply, is that it is insufficient in law, upon the face thereof. (Co. Civ. Proc. § 493). The rules which have been given with reference to the demurrer to the answer, apply to a demurrer to the reply. If the plaintiff in his reply, denies on information and belief, the allegations of the answer, which are clearly within his knowledge, as appears by the complaint, the reply is demurrable for insufficiency. (*Fallon*

v. Durant, 60 How. Pr. 178; S. C. 3 Law Bull. 13). Upon the hearing of a demurrer to a reply, all previous pleadings may be examined, and judgment will be rendered against the party who committed the first fault in pleading in the matter of substance (*Henriques v. Yale University*, 28 App. Div. 354; appeal dismissed, 157 N. Y. 672), "matter of substance" being only either a failure to state facts showing jurisdiction or a cause of action. (Co. Civ. Proc. § 499; *Straus v. Trotter*, 6 Misc. 77).

ARTICLE V.

AMENDMENTS AFTER DEMURRER.

Upon the decision of a demurrer, either at a general or special term, or in the court of appeals, the court may, in its discretion, allow the party in fault to plead anew or amend, upon such terms as are just. If a demurrer to a complaint is allowed, because two or more causes of action have been improperly united, the court may, in its discretion, and upon such terms as are just, direct that the action be divided into as many actions as are necessary for the proper determination of the causes of action therein stated. (Co. Civ. Proc. § 497). Section one hundred and seventy-two of the code of procedure, authorized the court to allow an amendment after demurrer, only if it appeared that the demurrer was interposed in good faith. Under that section it was held, that when a demurrer had been interposed which the pleader could not have supposed, would have disposed of the cause on the merits, it was not pleaded in good faith. (*Osgood v. Whittelsey*, 10 Abb. Pr. 134). At common law, a party who had interposed a demurrer, was not permitted to amend, unless he made it appear that he had merits, and that the demurrer was interposed in good faith. (*Miller v. Heath*, 7 Cowen, 101). Mr. Throop says that the amendments proposed by section four hundred and ninety-seven to section one hundred and seventy-two of the code of procedure are merely verbal; and it is supposed that they do not change

the rule which forbade the allowance of an amendment, if it appeared that the demurrer was not made or interposed in good faith. Whether or not the amendment will be allowed, is in the discretion of the court. (*Fisher v. Gould*, 81 N. Y. 228). That discretion cannot be reviewed in the court of appeals. (*Id.*). After a demurrer has been overruled with leave to answer, if the defendant permit final judgment to be entered, and appeal, leave to answer will not be given on the affirmance of the judgment. (*Whiting v. Mayor, etc.*, 37 N. Y. 600; *Fisher v. Gould*, 9 Daly, 144; *affd.* 87 N. Y. 228). If a demurrer is sustained with leave to amend, and an amended complaint has been served, and a demurrer to that has also been sustained, leave to amend the second time should not be granted. (*Lowry v. Inman*, 6 Abb. Pr. N. S. 394). As a practical matter leave to amend is now rarely refused; leave is denied only where it appears that the action cannot be maintained under any circumstances. (*Snow v. Fourth Nat'l Bk.*, 7 Robt. 479). If a part only of the pleading is demurred to, and leave has been given to amend that part, the pleader can only amend the portion demurred to. (*Fielden v. Carelli*, 26 How. Pr. 173). If the defendant is allowed to amend three defenses, he need not amend all of them; but he may confine his amendment to any one. (*Decker v. Kitchen*, 21 Hun, 332). But the defenses as to which he does not amend his answer, are disposed of by the demurrer. (*Ryan v. Mayor, etc.*, 42 Super. 202). If a party avails himself of leave to amend, or withdraw his demurrer, it is then out of the case, and it is no part of the record. (*Wheelock v. Lee*, 74 N. Y. 495). It is not then available to either party for any purpose (*Brown v. Saratoga R. R. Co.*, 18 N. Y. 495; *McCullough v. Pence*, 85 Hun, 271); but if the demurrer is overruled, and the party has leave to withdraw it on terms, and he goes to trial without complying with the terms, the demurrer still stands on the record, and appears upon it as an admission of the pleading demurred to. (*Cutler v. Wright*, 22 N. Y. 472).

ARTICLE VI.

WHEN OBJECTION TAKEN BY ANSWER.

Where any of the matters enumerated in section four hundred and eighty of the code of civil procedure, as grounds of demurrer, do not appear on the face of the complaint, the objection may be taken by answer. (Co. Civ. Proc. § 498).

ARTICLE VII.

WHEN OBJECTION IS WAIVED.

If such an objection is not taken, either by demurrer or answer, the defendant is deemed to have waived it, except the objection to the jurisdiction of the court, or the objection that the complaint does not state facts sufficient to constitute a cause of action. (Co. Civ. Proc. § 499). The meaning of this section is that when the objection is one which appears upon the face of the complaint, it must be taken by demurrer, or it is waived; or if it does not so appear, it must be taken by answer, or it is waived. (*Zabriskie v. Smith*, 13 N. Y. 322, 326; *Palmer v. Davis*, 28 N. Y. 242). When a complaint fails to state a material allegation, and the defendant does not demur but answers setting forth such omitted material allegation, it is too late for the defendant to object upon the trial that the complaint fails to state a cause of action. (*Reck v. Phœnix Ins. So.*, 17 Wk. Dig. 253). After issue joined, the plaintiff does not waive his right to demur to the answer of the defendant by noticing the cause for trial. (*Brossington v. Rohrs*, 3 Misc. 358, S. C. 23 Civ. Proc. Rep. 146).

CHAPTER XIV.

ARREST AND BAIL.

ARTICLE I....Cases where order of arrest may be granted.

ARTICLE II....Persons liable to arrest.

ARTICLE III...Order of arrest.

ARTICLE IV...Arrest, when and how made.

ARTICLE V...Discharge on bail or deposit.

ARTICLE VI...Charging and discharging bail.

ARTICLE I.

CASES WHERE ORDER OF ARREST MAY BE GRANTED.

SECTION.

1. Where right depends on nature of action.
2. Where right depends partly on extrinsic facts.

Sec. 1. Where Right Depends on Nature of Action.

A defendant may be arrested in an action, as prescribed in title 1 of chapter 7 (Co. Civ. Proc.), where the action is brought for either of the following causes:

1. To recover a fine or penalty.
2. To recover damages for a personal injury; an injury to property, including the wrongful taking, detention or conversion of personal property; breach of a promise to marry; misconduct or neglect in office, or in a professional employment; fraud, or deceit; or to recover a chattel, where it is alleged in the complaint that the chattel or a part thereof has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with intent that it should not be so found or taken, or to deprive the plaintiff of the benefit thereof; or to recover for money received, or to recover property or damages for the conversion or misapplication of property, where it is alleged in the complaint that the money was received, or the property was

embezzled, or fraudulently misapplied by a public officer, or by an attorney, solicitor or counselor, or by an officer or agent of a corporation or banking association in the course of his employment, or by a factor, agent, broker, or other person in a fiduciary capacity. Where such allegation is made, the plaintiff cannot recover, unless he proves the same on the trial of the action; and a judgment for the defendant is not a bar to the new action to recover the money or chattel.

3. To recover moneys, funds or property, held or owned by the state, or held or owned officially or otherwise for or in behalf of a public or governmental interest by a municipal or other public corporation, board, officer, custodian, agency or agent, of the state, or of a city, county, town, village or other division, subdivision, department, or portion of the state, which the defendant has without right obtained, received, converted, or disposed of; or to recover damages for so obtaining, receiving, paying, converting, or disposing of the same.

4. In an action upon contract, express or implied, other than a promise to marry, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability, or that he has since the making of the contract, or in contemplation of making the same, removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same with like intent; but where such allegation is made, the plaintiff cannot recover, unless he prove the fraud on the trial of the action; and a judgment for the defendant is not a bar to a new action to recover upon the contract only. (Co. Civ. Proc. § 549).

The section of the code above quoted contains all of the cases where the defendant may be arrested, excepting the one given in section five hundred and fifty of the code.

A person shall not be arrested in a civil action or special proceeding, except as prescribed by statute. The writ of *ne exeat* is hereby abolished. (Co. Civ. Proc. § 548). An order of arrest should not be granted, where its propriety depends upon a doubtful or important

question of law (*Cormier v. Hawkins*, 69 N. Y. 188); nor where it is not warranted by a strict construction of the provisions of the code. (*South Isl. Nav. & Imp. Co. v. Sherwin*, 1 Civ. Proc. Rep. 44). The provisions of the code authorizing arrest in civil actions, do not give to the plaintiff an absolute right to arrest the defendant; but it rests in the sound discretion of the judge to grant or refuse the order. (*Knickerbocker L. Ins. Co. v. Ecclesine*, 34 Super. 76, 82). The language of the section is permissive. (*Griswold v. Sweet*, 49 How. Pr. 171). The defendant cannot be arrested in a suit, in which are joined causes of action, upon one of which he was not liable to arrest (*Easton v. Cassidy*, 21 Hun, 459); nor can the defendant be arrested a second time, by process upon the same cause of action, where the second action is vexatious (*Ewart v. Schwartz*, 48 Super. 390); but this exemption is not a legal right, but to be determined by the circumstances; and if the second suit is not vexatious, an order of arrest may be granted (*People v. Treed*, 63 N. Y. 202); and in the case of the *Citizens National Bank v. Vorhis* (39 Hun, 24), it was held that where the facts failed to show that the successive arrests were resorted to for the purpose of vexing and harassing the defendant, a third order of arrest should not be vacated. Of course, the principle controlling the issuing of another order of arrest in a second action is precisely the same as that governing a second order of arrest in the same action. Where, therefore, an order of arrest has been vacated for insufficiency of the affidavits, the plaintiff may, later, upon further proof, and upon showing that it is not vexatious, secure a second order in the same action. (*Meucci v. Raudnitz*, 20 Hun, 343).

Under subdivision one of section five hundred and forty-nine, in order to subject a party to arrest, the cause of action must be a fine or penalty, and not something of a penal character. (*Glens Falls Paper Co. v. White*, 58 How. Pr. 172; *U. S. v. Reid*, 4 Civ. Proc. Rep. 1; *Staub v. Myers*, 16 App. Div. 476).

Under subdivision two of section five hundred and forty-nine, the defendant may be arrested in an action

to recover damages for a personal injury. The "personal injury" is defined as including libel, slander, criminal conversation, seduction, malicious prosecution, and also assault, battery, false imprisonment, or other actionable injury to the person, either of the plaintiff, or of another (Co. Civ. Proc. § 3343, subd. 9); for either of which the defendant may be arrested, upon the proper proof being made. For libel (*Blakelee v. Buchanan*, 44 How. Pr. 97), for criminal conversation (*Stuyvesant v. Bowran*, 3 Abb. Pr. N. S. 270); for seduction (*Steinberg v. Lasker*, 50 How. Pr. 432); for malicious prosecution (*Dempsey v. Lepp*, 52 How. Pr. 11); for assault and battery (*Schultz v. Schultz*, 2 Civ. Proc. Rep. 282; reversed on another point, 89 N. Y. 644). In an action by the wife for a limited divorce, on the ground of cruel treatment, an order of arrest may be granted (*Gardiner v. Gardiner*, 3 Abb. N. C. 1); but an action for an absolute divorce is not an action for a personal injury so that an order of arrest could be granted on it. (*McIntosh v. McIntosh*, 12 How. Pr. 289). This case did not involve the question whether or not an order of arrest could not be granted in an action for an absolute divorce. At the time it was decided the writ of *ne exeat* had not been abolished (*Collins v. Collins*, 80 N. Y. 24, 26); and that writ afforded a sufficient remedy when it was necessary to restrain the person of the defendant, during the pendency of an action, for divorce. Since that writ has been abolished the remedy in such cases is given by section five hundred and fifty of the code, as will be seen hereafter. A wife may maintain an action against any one for enticing her husband from her, and may cause the defendant to be arrested. (*Breiman v. Paasch*, 7 Abb. N. C. 249). The courts are reluctant to grant orders of arrest in actions for personal injuries, except in extreme or outrageous cases (*Knickerbocker L. Ins. Co. v. Ecclesine*, 34 Super. 76), or where it is satisfactorily shown that there is danger of defendant leaving the state (*Pfluger v. Lescke*, 4 Law Bull. 87), or where defendant has shown malice, in instituting civil suit without probable cause, which terminated in plaintiff's favor. (*Dempsey v. Lepp*, 52 How. Pr. 11). Before

the enactment of the code of civil procedure, it was held that the right to arrest the defendant was a personal right for injuries received by the plaintiff, and which right dies with the plaintiff (*Ryall v. Kennedy*, 52 How. Pr. 517); but by the language of the ninth subdivision of section thirty-three hundred and forty-three, of the code of civil procedure, which defines a personal injury, as an actionable injury to the person of the plaintiff or of another, it would seem that this right was extended, so that the plaintiff might cause the arrest of the defendant, for an injury to the person of another. It is expressly so held in a case brought by the plaintiff to recover damages, after the death of the plaintiff's intestate, caused by the negligence of the defendant (*Haines v. Jeroloman*, 2 McC. Civ. Proc. Rep. 196); and it is further held, that the personal injury need not be willful (*Ritterman v. Ropes*, 52 Super. 236), unless the defendant be a woman. (*Id.*). An assignee of a cause of action, takes with it all the rights to its enforcement that existed in favor of the assignor; and as such may enforce his claim by arrest. (*Meyer v. Belden*, 8 Wk. Dig. 344).

The defendant may be arrested in an action to recover for injury to property, including the wrongful taking, detention or conversion of personal property. An injury to personal property is defined to be an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract. (Co Civ. Proc. § 3343, subd. 10). An action to recover the possession of real property, with damages for detaining the same, was held not to be an action for an injury to property within this section (*Merritt v. Carpenter*, 3 Keyes, 142); but in the later case of *Welch v. Winterburn* (14 Hun, 518), it was held that the words "injury to property" include real estate as well as personal property; and the words immediately following, "including the wrongful taking, detention or conversion of personal property" did not have the effect to restrict the meaning of the words, but rather confirm the impression that the intention was to embrace real property. In an action brought to recover property, which had been taken

from the plaintiff by a conspiracy and by fraud, an order of arrest may be granted (*Bruce v. Kelly*, 5 Hun, 229); so, where the gravamen of the complaint is the wrong and injury done to the plaintiff's property by the defendant, an order of arrest may be granted. (*Niver v. Niver*, 29 How. Pr. 6). Where the defendant received goods of the plaintiff, and agreed to return them or their value, and he afterwards refused to return them or to pay for the same, an order of arrest was held proper (*Person v. Civer*, 29 How. Pr. 432); and this liability to arrest was not waived by the plaintiffs receiving part payment in money, and due bills for the residue. (*Id.*). Where the plaintiff deposited a check with the defendant for collection, and the proceeds to be applied to a special purpose, and the defendant collected the same, and gave the plaintiff credit therefor, instead of paying it as specified, an order of arrest was held proper. (*Eckert v. Belden*, 1 Law Bull. 61). Where, after the conversion of the plaintiff's property by the defendant, the plaintiff treats the transaction as a contract of sale, and takes a confession of judgment for goods sold and delivered, he thereby waives his right to arrest the defendant. (*Fields v. Bland*, 81 N. Y. 239). Unliquidated damages arising out of a tortious act, are not regarded as a debt, and a party is liable to arrest on such a claim. (*Zinn v. Ritterman*, 2 Abb. Pr. N. S. 261). An action under the statute to recover money lost at gaming is not one in which an order of arrest can be granted. (*Tompkins v. Smith*, 62 How. Pr. 499; *affd.* without op., 89 N. Y. 602); nor is the similar action to recover moneys paid by the plaintiff to persons conducting alleged illegal lotteries. (*Staub v. Myers*, 16 App. Div. 476). A defendant may be arrested for a breach of promise to marry (Co. Civ. Proc. § 549, subd. 2); but where the action is brought by a male against a female, for breach of promise to marry, the defendant cannot be arrested. (Co. Civ. Proc. § 553; *Siefke v. Tappey*, 3 Co. Rep. 23). For misconduct or neglect in office, or in a professional employment, the defendant may be arrested. (Co. Civ. Proc. § 549, subd. 2). Thus, the directors of a corporation may be arrested for fraudulent and illegal

acts, in disposing of the property of the corporation, in an action brought by the stockholders. (*Crook v. Jewett*, 12 How. Pr. 19). Where the register of New York city makes and certifies to an erroneous return to a written requisition for a search in his office, he is guilty of misconduct or neglect in office within this section, and is liable to arrest in an action to recover damages, for such erroneous return even though he did not himself make the search or personally certify to it. (*Van Schaick v. Sigel*, 9 Daly, 383). An attorney may be arrested in an action brought to recover money collected by him for his client, which he has omitted to pay over. (*Stage v. Stevens*, 1 Den. 267). If the attorney reside in another state, and collects the money there, still he is liable to arrest in this state, in an action brought to recover such money (*Yates v. Blodgett*, 8 How. Pr. 278); for it is held that our remedy by arrest is applicable to cases where the debt is fraudulently contracted in a foreign country. (*Brown v. Ashbough*, 40 How. Pr. 226). An order of arrest may be granted, in an action for the conversion of money received in a fiduciary capacity, although some of the money was received in another state (*Castree v. Kirby*, 2 Civ. Proc. Rep. 334); and in a case where the defendants, doing business in another state, bought goods in this state, and subsequently disposed of their property with intent to defraud their creditors, it is held that an order for the arrest of the defendants was properly granted in an action in this state. (*Claffin v. Frenkel*, 29 Hun, 288, S. C. 3 Civ. Proc. Rep. 109). A defendant may be arrested in an action brought to recover damages for fraud or deceit. (Co. Civ. Proc. § 549, subd. 2). Deceit or fraudulent representations, accompanied by damages, constitute a good ground of action in respect to real as well as personal property, and an order of arrest is proper in such a case. (*Crandall v. Bryan*, 15 How. Pr. 48). The purchase of goods with the intent to convert them into property, which cannot be reached by execution, is such a fraud as will make the defendant liable to arrest. (*Wallace v. Murphy*, 22 How. Pr. 414). To render defendant liable to arrest, he must have actually par-

ticipated in the fraud, and it must be his actual personal fraud, and not be merely a legal or constructive fraud (*Hathaway v. Johnson*, 55 N. Y. 93); thus where one of two partners withdraw a large amount of money from the business of the firm, for the reason that it had suffered severe losses, and that the other partner had already transferred a considerable portion of his property to his wife, without consideration, an order of arrest cannot be granted, against the partner who withdrew his money, without proof that he had either disposed, or intended to dispose, of some of this money to defraud his creditors. (*Scott v. Reid*, 2 How. Pr. N. S. 521). The fraud of an agent, unless subsequently adopted and ratified by the principal, does not afford ground for the principal's arrest. (*Smith v. Tracy*, 36 N. Y. 79; *Ellson v. Hance*, 44 App. Div. 296). Where a debtor makes false representations in fact, he will be held to have intended the legitimate consequences of his act, and he will not be permitted to say that he did not intend to defraud the plaintiff. (*Whitcomb v. Salsman*, 16 How. Pr. 533).

In an action to recover a chattel, where it is alleged in the complaint that the chattel, or a part thereof has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with intent that it should not be so found or taken, or to deprive the plaintiff of the benefit thereof, the defendant may be arrested. (Co. Civ. Proc. § 549, subd. 2). There was formerly a belief, to some extent founded on judicial determination, that an order of arrest could not be granted under this provision of the code, unless it was shown that the fraudulent disposition of the chattel had reference to some suit, either pending or anticipated (*Watson v. McGuire*, 2 Daly, 219), but it is now clearly settled that the intent requisite to sustain an order of arrest under this clause of the code may be solely to put the property beyond the reach of the owner, no legal steps by the latter being contemplated by the fraudulent actor. (*Barnett v. Selling*, 70 N. Y. 492; S. C., 3 Abb. N. C. 83). Accordingly it was held in this case that an order of arrest may be granted in an action

to recover possession of a chattel, if the wrong-doer has disposed of it to a *bona fide* purchaser or otherwise, so that it cannot be taken on process against the defendant. So, where the plaintiff had been induced, by the false and wrongful representations of the defendant, to sell him goods, and the defendant soon thereafter, made an assignment for the benefit of creditors, and the sheriff was unable to find the chattels, an order of arrest is justified. (*Lippman v. Shapiro*, 50 Super. 367). The distinction, with reference to orders of arrest between the actions of conversion and replevin must be borne in mind; in both actions orders of arrest may be obtained, but in replevin the order will be granted only where it is alleged that the property, or a part thereof, has been concealed, removed or disposed of, so that it cannot be found by the sheriff, while in conversion such allegations are not necessary. (*Hough v. Solmsbee*, 59 Hun, 148; *Michaelis v. Towne*, 59 N. Y. Supp. 721). To authorize an order of arrest in such a case, the facts constituting the fraud must be alleged in the complaint; and if they are so alleged, they must be proven on the trial, or else the plaintiff cannot recover. (Co. Civ. Proc. § 549, subd. 2). It is necessary, also, to allege facts showing that the chattel is of real value; in case such facts are not set forth the court could hold the defendant in nominal bail only, and orders of arrest should not be granted under such circumstances. (*Morton v. Chesley*, 3 App. Div. 446).

In an action to recover money received, or to recover property, or damages for the conversion or misapplication of property, where it is alleged in the complaint, that the money was received, or the property was embezzled, or fraudulently misapplied by a public officer, or by an attorney, solicitor or counselor, or by an officer or agent of a corporation, or banking association, in the course of his employment, or by a factor, agent, broker, or other person, in a fiduciary capacity, the defendant may be arrested. (Co. Civ. Proc. § 549, subd. 2). Thus, in an action to recover moneys received by a factor and converted by him, a defendant may be arrested (*Wallace v. Castle*, 14 Hun, 106), even though

the factor is acting under a *del credere* commission. (*Ostell v. Brough*, 24 How. Pr. 274). If he has actually received the proceeds of the sale, he is liable to arrest for a failure to pay them over; if, however, he has not received such proceeds, and is sued upon his guaranty, he is not liable to arrest. (*Wallace v. Castle*, *supra*). So if, after the misappropriation by the agent of moneys received in a fiduciary character, the principal settles with him by taking his check and acceptance payable in future, the principal's claim ceases to be one in the nature of a wrong and becomes a debt. (*Alliance Ins. Co. v. Cleveland*, 14 How. Pr. 408; *Martin v. Lynch*, 14 Misc. 47). Where, however, the principal is induced to make such an arrangement by means of false and fraudulent statements of the agent, the former may repudiate the settlement for fraud, and thereupon regains his right to arrest the defendant on account of the tortious cause of action. (*Spence v. Baldwin*, 59 How. Pr. 375; *affd.* 22 Hun, 618). So, also, a draft upon the agent by the principal, which draft is unpaid at maturity, does not take away from the principal the right to arrest. (*Kelly v. Scripture* 9 Hun, 283). Where the plaintiff brings his action to recover money deposited with a broker, and there was no fraud in the contracting, or incurring the liability, the plaintiff cannot bring his cause of action within subdivision four, of section five hundred and forty-nine of the code, by allegations of fraud in the complaint, in relation to subsequent transactions, which it is claimed, resulted in a loss to the plaintiff. (*Graeffe v. Currie*, 52 Super. 554). A guardian, who takes possession of the funds of his ward, and appropriates them to his own use, is liable to arrest for not paying over the funds, when legally called upon although he has the permission of his ward. (*Wheelock v. Stewart*, 28 How. Pr. 89). In cases of an alleged misappropriation of moneys, by a person acting in a fiduciary capacity, the test is whether the specific moneys ought in good faith to have been kept and paid over, or whether the agent had a right to use them. (*Liddell v. Paton*, 7 Hun, 195; appeal dismissed, 67 N. Y. 393). For example, a factor or broker may well be entrusted with a certain fund of

money to be used in carrying on a certain business for his principal; in such a case, it is clear that the proceeds of his operations with the fund, in his hands at a given time, have not been received in a fiduciary capacity and that he cannot be arrested in an action for conversion of such proceeds. (*Decatur v. Goodrich*, 44 Hun, 3). Where a broker has received money of another for a specified purpose, and uses it for some other purpose, he is liable to arrest. (*Dubois v. Thompson*, 25 How. Pr. 417). One who receives money from plaintiff to pay directly to a third party, and omits to do so, may be arrested as well because he received the money as agent, as because of his fiduciary capacity. (*Burhans v. Casey*, 4 Sand. 707). So where plaintiff executes and delivers to the defendant a bond and mortgage, for the defendant to sell and deliver him (plaintiff) a certain proportion of the proceeds, the defendant may be arrested in an action to recover that proportion; he received the money in a fiduciary character. (*Gibbs v. Hichborn*, 12 Hun, 480). A banker who received a remittance from a correspondent, with instructions to send a draft for the amount to a third person, is liable to arrest if he appropriates it to his own use. (*Johnson v. Whitman*, 10 Abb. Pr. N. S. 111). A county treasurer is a public officer, and receives moneys of the county or the state in a fiduciary capacity, and may be arrested if he converts them to his own use. (*People v. Clark*, 45 How. Pr. 12). A party may be arrested for a refusal to pay over moneys, received in a fiduciary capacity, although the refusal be on the ground that a third person has interposed some claim to the moneys. (*Gross v. Graves*, 19 Abb. Pr. 95). In the case of *Segelken v. Meyer* (94 N. Y. 473, 488), the court says that the grounds of arrest specified in subdivisions one and two of section five hundred and fifty of the code of civil procedure (now embraced in subdivisions two and four of section 549 of the code) have no proper place in the complaint; but by chapter 672, of the laws of 1886, section five hundred and forty-nine of the code, was so amended as to expressly provide in subdivisions two and four thereof, that the complaint

should contain those grounds in order to authorize an arrest; and where such allegation is made, the plaintiff cannot recover in the action, unless he proves the same on the trial of the action. It is sufficient to state facts and circumstances showing that the money had been received in a fiduciary capacity; the complaint need not expressly state that the money was received in a fiduciary capacity. (*Moffat v. Fulton*, 132 N. Y. 507). The cases of *Hillis v. Bleckert* (53 Hun, 499) and *Genin v. Schwenk* (62 Hun, 575) were expressly overruled. See, however, the case of *Heller v. Mangles* (42 App. Div. 621), which follows the *Genin* case. The requirement that "where such allegation is made, the plaintiff cannot recover in the action, unless he proves the same on the trial of the action," does not apply to a judgment by default. (*Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 288; appeal dismissed, 159 N. Y. 574; mo. for re-argument denied, 160 N. Y. 312).

Under subdivision three of section five hundred and forty-nine authorizing the granting of an order of arrest in an action brought to recover money, funds or property held or owned by the state, or for or in behalf of a public or governmental interest, etc., which the defendant has, without right, obtained, received, converted or disposed of; such an order is not authorized in an action brought by the people to recover property, which is alleged to have been forfeited to the state, by reason of the defendant's having offered the same for sale or distribution, in violation of the provisions of the statutes against lotteries. (*People v. Phillips*, 30 Hun, 553; appeal dismissed, 101 N. Y. 639). Where the defendant and other persons had acted together fraudulently to obtain and divide among themselves a large amount of public money; it was held that the law imposed upon the defendant individually a liability, coextensive with the money wrongfully abstracted, although a portion of it may have been received by other persons acting with him. (*People v. Tweed*, 5 Hun, 382; 63 N. Y. 202).

Under subdivision four of section five hundred and forty-nine, in order to subject the defendant, in an action upon contract express or implied to arrest for fraud

in creating or incurring the liability sought to be enforced, the facts showing such fraud on his part, must now be alleged in the complaint. (*Hecht v. Levy*, 20 Hun, 53). The fraud must be in "contracting or incurring the liability," not in an ostensible performance of the contract. (*Mooney v. La Follette*, 21 App. Div. 510). The order cannot be granted under this subdivision unless a complaint is one of the papers handed upon the application; the language of the subdivision: "Where it is alleged in the complaint," presupposes the existence of a complaint. (*Engelhardt Co. v. Benjamin*, 2 App. Div. 9). Allegations in a complaint in an action to recover money lent that the defendant falsely and fraudulently made certain representations for the purpose of obtaining the money from the plaintiffs and that the representations were, in fact, false, are sufficient to comply with the requirements of this section. (*Elwell v. Russell*, 29 App. Div. 436). The provision, that "Where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action," has no application to cases where no arrest is made, or sought; in such cases the mere fact that the plaintiff alleges fraud does not require him to establish such fact to recover upon the merits of an action which is completely established independently of the fraud. (*McGuire v. Bausher*, 52 App. Div. 276). A verified complaint will be considered as an affidavit for the purpose of procuring the order. (Co. Civ. Proc. § 3343, subd. 11). To constitute a disposition of property by a debtor with intent to defraud his creditors, the thing disposed of must be of value, out of which the creditor could have made a portion of his claim; and must have been transferred with intent to defraud. (*Hoyt v. Godfrey*, 88 N. Y. 669). In an action upon contract against partners, to justify the arrest of any defendant, it is necessary to prove that he actually and individually participated in the fraud, which is alleged to be connected with the contracting of the liability. (*Bacon v. Kendall*, 49 Super. 123; *Scott v. Reed*, 2 How. Pr. N. S. 521). A fraudulent disposition of his property by a debtor with intent to defraud

his creditors, avoids a credit upon which goods were previously or subsequently sold to him, and is a proper case for an order of arrest (*Arnold v. Shapiro*, 29 Hun, 478), provided such fraudulent disposition was made prior to, or was contemplated at the time of obtaining the credit. (*Forster v. Gallinger*, 62 Hun, 439). Formerly under this subdivision, where a husband without cause abandoned his wife, and fraudulently disposed of his property, so that it could not be appropriated to her support, he might be arrested in an action brought by one who has expended money in supporting the wife (*Tunstall v. Winton*, 27 Hun, 264); but this decision was overruled by the court of appeals without opinion, all the judges concurring. (90 N. Y. 653). An actual intent to defraud, clearly apparent from the facts, is essential to sustain the validity of the order of arrest, and the burden of proof is upon the party alleging the fraudulent intent. (*Kessler v. Levy*, 11 Misc. 275; *affd.* without op., 147 N. Y. 700). For example an intent to defraud will not be imputed to a purchaser on credit, merely from the fact that he was to his own knowledge insolvent, at the time of the purchase, and that he omitted to disclose such condition to his vendor; this must be accompanied by facts disclosing an intent to acquire the property without paying for it. (*Morris v. Talcott*, 96 N. Y. 100). Of course, each case rests on its own facts as to whether enough facts are shown to sustain the burden imposed upon the party alleging fraud. In the case of bankers greater confidence is asked, and required, and a more rigid responsibility for good faith; so a banker who is to his own knowledge hopelessly insolvent, will be held to have intended the inevitable consequences of his act, i. e., to cheat and defraud all persons whose money he receives. (*Anonymous*, [*Roebeling v. Duncan*] 67 N. Y. 598).

Sec. 2. Where Right Depends Partly Upon Extrinsic Facts.

A defendant may also be arrested in an action, wherein the judgment demanded requires the performance of an act, the neglect or refusal to perform which would

be punishable by the court as a contempt, where the defendant is not a resident of the state, or being a resident, is about to depart therefrom, by reason of which non-residence or departure, there is danger that a judgment or an order requiring the performance of the act will be rendered ineffectual. (Co. Civ. Proc. § 550). By chapter 672, Laws of 1886, the above section, which formerly was subdivision four thereof, was all that was retained in that section; the other subdivisions being embodied in section five hundred and forty-nine.

This section is a substitute for the old writ of *ne exeat*, which was abolished by section five hundred and forty-eight of the code of civil procedure, putting an end to the much mooted question whether the section one hundred and seventy-eight of the code of procedure abolished the writ or not; so a reference to the decisions on that question will not be of any practical value. The only object for which a person is detained by *ne exeat*, is that the person may be present at the time a decree is pronounced, to respond to it. If the person of the defendant cannot be made to respond to the decree, it is worse than idle to keep him. (*Gleason v. Bisby*, Clarke's Ch. 551). To warrant the issuing of an order of arrest in the nature of *ne exeat*, there must be a debt or duty, existing at the time, and this must generally be an equitable debt. (Id.). It is always in the discretion of the court whether the order shall be granted or not (Co. Civ. Proc. § 551); such an order can be granted only by the court (Id.); and if there is any doubt as to the liability of the defendant, the order of arrest should not be granted (*Allen v. Hyde*, 2 Abb. N. C. 197); nor should it be granted on an ordinary legal demand. (Id.). An order of arrest may issue against a foreigner, or against a citizen of another state, and on demands arising abroad. (*Woodward v. Schatzell*, 3 Johns. Ch. 412). A woman may be arrested under this section, where a proper case is made out against her. (Co. Civ. Proc. § 553). The real necessity for the writ of *ne exeat*, or for its substitute, exists when the judgment may require the defendant to do some personal act, such as to execute a deed, or the like, that he may

be present to obey. (*Brownell v. Akin*, 6 Hun, 378). Where it is perfectly clear that specific performance will be decreed, an order will be granted. (*Brown v. Haff*, 5 Paige 235). In the case last cited, it was further held, in an action for a specific performance of a contract against a vendee, that before a *ne exeat* would be granted, it must appear that the plaintiff must show affirmatively that he is able to make a good title of the premises agreed to be sold. The writ of *ne exeat* was confined, in suits for specific performance, to those brought against the vendee, the principle being that the writ was in the nature of equitable bail which could be ascertained in the case of the vendee by reason of the purchase price, but which could not be fixed where the action is against the vendor. (*Cowdin v. Cram*, 3 Edw. Ch. 231). The rule and its reason survive the enactment of section 550 of the code of civil procedure. (*Gordon v. Fox*, 18 Civ. Proc. Rep. 291). A defendant may be arrested in an action for divorce and alimony. (*Forrest v. Forrest*, 5 How. Pr. 125; *Boucicault v. Boucicault*, 21 Hun, 431, S. C. 59 How. Pr. 131). In the case last cited, the court says, that in an action for divorce, the court may require that the defendant give reasonable security for the maintenance of his children, and for any allowance awarded to his wife; and if such a judgment were rendered, and the defendant refused to perform the act, he may be punished by the court as for a contempt; as the requirement would be a lawful mandate, and the refusal of the defendant to obey would be a contempt, and he may properly be arrested.

ARTICLE II.

PERSONS LIABLE TO ARREST.

SECTION.

1. Who may be arrested.
2. Who are privileged from arrest.

Sec. 1. Who May Be Arrested.

The provisions of the code in relation to arrest, should be construed strictly in favor of the liberty of the citizen. (*Hathaway v. Johnson*, 55 N. Y. 93). A personal liability is necessary as a foundation for the order, and a principal is not liable to arrest for the fraud of his agent, without a personal participation therein, or a ratification of the fraudulent act. (*Id.*). The recovery of judgment in a court, not of the state, for the same cause of action; or, where the action is founded upon fraud or deceit, for the price or value of the property obtained thereby; does not affect the right of the plaintiff to arrest the defendant, as prescribed in title one of chapter seven of the code. (Co. Civ. Proc. § 552). The better procedure under this section is to bring the action on the foreign judgment instead of on the original cause of action; the code provision simply keeps alive the right to arrest, which was an incident to the original cause of action (*Baxter v. Drake*, 85 N. Y. 502), but it is permissible to sue on such original cause of action, and, of course, secure an order of arrest. (*Pitt v. Freed*, 28 N. Y. Supp. 863). It is not thought necessary to repeat in this article at length, the persons who may be arrested, as the subject has been substantially gone over under article one, of this chapter, which treats of the causes for which a defendant may be arrested. Suffice it to say here, that any person whose acts bring him within the provisions of sections five hundred and forty-nine and five hundred and fifty of the code of civil procedure, may be arrested upon a proper application being made, unless by law he is privileged or exempt from arrest on civil process. So it will be seen that it becomes more important to know who may not be arrested, even though coming within those sections of the code

authorizing the arrest of the defendant, and that subject will be treated in the next section, as follows:

Sec. 2. Who Are Privileged from Arrest.

A woman cannot be arrested as prescribed in title one, of chapter seven, of the code of civil procedure except in a case where the order can be granted only by the court; or where it appears that the action is to recover damages for a wilful injury to person, character, or property. (Co. Civ. Proc. § 553). By this section, a woman may be arrested, when the order of arrest is to keep her within the jurisdiction of the court, as by writ of *ne exeat*. (*Neville v. Neville*, 22 How. Pr. 500). The intention of the last clause of section five hundred and fifty-three above cited, is to exempt women from arrest in all cases, except where the injuries specified in the code are affirmatively shown to be wilful; and to make them subject to arrest, when the injury is attended with that element. (*Duncan v. Katzen*, 6 Hun, 1; *affd.* without op., 64 N. Y. 625). The injury need not be to the thing simply, but to the owner's right in and to the thing. (*Id.*). It was formerly held that a married woman was exempt from arrest in all cases, proceeding on the theory that her personality was merged in that of her husband; but since the reason of the rule has ceased, and a married woman may be sued in all cases as though she were single, it is held that an order of arrest may be issued against any woman, whether married or single, in an action to recover damages for a wilful injury to person, character, or property; and that a married woman is not entitled to have the order vacated merely on the ground that she is married. (*Muser v. Miller*, 12 Abb. N. C. 305).

A lunatic, an idiot, or an infant under the age of fourteen years, if arrested, may be discharged from arrest as a privileged person, in the discretion of the court. The application for his discharge may be made, in his behalf, by a relative, or by any other person, whom the court or judge permits to represent him for the purpose. (Co. Civ. Proc. § 554). In the case of an infant, who makes false statements as to his property,

when buying goods other than necessities, he cannot be made liable to arrest by changing the form of action from one on contract, and bringing it in fraud (*Taylor v. Van Keuren*, 54 How. Pr. 25); for even if the statements made were true, still, as the contract would be void by reason of infancy, the fraudulent or false statements wrought no injury to the plaintiff; and in order to warrant an arrest the statement must injure. (*Id.*). As to the question whether an infant is liable, who obtains goods by falsely and fraudulently representing himself to be of full age, there is some conflict of decisions. The case of *Brown v. McCune* (5 Sand. 224), holds that an infant is not liable; but the later case of *Eckstein v. Frank* (1 Daly, 334), holds that he is liable; and further that the case of *Brown v. McCune* (*supra*), had been distinctly repudiated. To the same effect also see *Wallace v. Morss* (5 Hill, 391), and *Schunemann v. Paradise* (46 How. Pr. 426). The entire weight of authority is in favor of holding an infant liable in such cases.

A person prosecuted in a representative capacity, as heir, executor, administrator, legatee, devisee, next-of-kin, assignee, or trustee, cannot be arrested, as prescribed in title one, chapter seven, of the code of civil procedure, except for his personal act. (Co. Civ. Proc. § 555).

Title one of chapter seven, of the code does not abridge or affect a privilege from arrest given by law, or a right of action for a breach thereof. A privileged person is entitled to be discharged from arrest, where other provision is not made therefor by law by the court or a judge thereof; or by the county judge of the county where the arrest was made. The order must be made upon proof by affidavit, of the facts entitling the applicant to the discharge; and the arrest and discharge are not a bar to a new arrest, after the privilege has ceased. The court or judge may make the order without notice, or may require notice to be given to the sheriff or to the plaintiff, or to both. (Co. Civ. Proc. § 564). Under this section the following persons may be specifically

mentioned as privileged from arrest, or entitled to be discharged if arrested:

Members of either branch of congress are privileged from arrest, during their attendance at the session of their respective houses, and in going to and returning from the same; except in cases of treason, felony and breach of the peace. (U. S. Const., Art. 1, § 6).

All persons in the public service are exempt, as a matter of policy, from arrest upon civil process, while thus engaged. (*United States v. Kirby*, 7 Wall. 482).

A member of the legislature shall be privileged from arrest in a civil action or proceeding other than for a forfeiture or breach of trust in public office or employment, while attending upon its session, and for fourteen days before and after each session, or while absent for not more than fourteen days during the session, with the leave of the house of which he is a member.

An officer of either house shall be privileged from arrest in such a civil action or proceeding while in actual attendance upon the house. Either house shall have the power to discharge from arrest any of its members or officers arrested in violation of his privilege from arrest. (The Legislative Law, § 2). For a discussion of the question of the privilege of members of the legislature, see *Matter of Potter & French* (55 Barb. 625).

Neither the superintendent of public works nor any assistant superintendent or deputy, superintendent of repairs, lock-keeper or other public officer employed upon or in charge of the canals, shall be liable to arrest or to be held to bail in any civil action for any act done or omitted to be done by him in the exercise of his official duties. (The Canal Law, § 31).

No person belonging to the military force shall be arrested on any civil process while going to, remaining at, or returning from any place at which he may be required to attend for military duty. (The Military Code, § 148).

Although this statute applies in terms only to the militia of this state, it has been held to apply to a member of a regiment of the state militia, which has been

mustered into the service of the United States. (*People v. Campbell*, 40 N. Y. 133).

An enlisted man of the United States, during his term of service, shall not be arrested on mesne process, unless the debt was contracted before his enlistment, and amounted to twenty dollars when first contracted. (Rev. Stat. of the U. S., § 1237).

Marines shall be exempt, while enlisted in said service, from all personal arrest for debt or contract. (Rev. Stat. of the U. S., § 1610).

Foreign ministers and their domestics are privileged from arrest. (Rev. Stat. of the U. S., § 4063). That section does not apply to any case, where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of a public minister, and the process is founded upon debt contracted before he entered such service; nor to any case, where the person against whom the process is issued is a domestic servant of a public minister, unless the name, before the issuing thereof, has been registered in the department of state, and transmitted to and posted by the marshal of the District of Columbia in some public place in his office. (Id. § 4065).

A person duly and in good faith subpoenaed or ordered to attend, for the purpose of being examined, in a case where his attendance may be lawfully enforced by attachment, or by commitment, is privileged from arrest in a civil action or special proceeding while going to, remaining at, or returning from the place where he is required to attend. (Co. Civ. Proc. § 860). A non-resident witness attending as a witness in this state, is exempt from the service of process. (*Person v. Grier*, 66 N. Y. 124). To the same effect see the case of *Frisbie v. Young* (11 Hun, 474), which case held that a resident witness was exempt only from arrest; but that a non-resident witness was exempt both from arrest and the service of process; but the officer arresting him will not be liable, unless he claims his privilege, and makes affidavit as required by section eight hundred and sixty-four of the code of procedure. This privilege of witnesses from arrest extends to hearings before arbitrators

and referees (*Sanford v. Chase*, 3 Cow. 381), and to the taking of testimony under section 863 of the revised statutes of the United States. (*Parker v. Marco*, 136 N. Y. 589). Where a witness is in voluntary attendance, he is not so privileged, unless he is a non-resident, or a party. (*Hardenbrook's Case*, 8 Abb. Pr. 416).

Parties to actions are exempt from arrest in civil actions while going to, remaining at, or returning from, the court or place where the trial or the judicial proceeding is being conducted (*Salhinger v. Adler*, 2 Robt. 704; *Mackay v. Lewis*, 7 Hun, 83); or before any lawful tribunal (*Parker v. Marco*, 136 N. Y. 589), as an arbitration (*Sanford v. Chase*, 3 Cow. 381), or before referees. (*Clark v. Grant*, 2 Wend. 257).

No person on the police force of New York city, while actually on duty shall be liable to arrest on civil process. (Greater New York Charter, § 341). Under this provision, it is held that the exemption is only intended to prevent the arrest of an officer, while actually discharging his public duty; and that he could not be deemed to be always on duty, so as never to be liable to arrest while holding the office. (*Hart v. Kennedy*, 15 Abb. Pr. 290). An officer of a court of record, appointed or elected pursuant to law, is privileged from arrest, during the actual sitting, which he is required to attend, of a term of the court of which he is an officer, and no longer; but an attorney or counselor is not thus privileged, unless he is employed in a cause, to be heard at that term. (Co. Civ. Proc. § 565). Officers of the court formerly were exempt, during the actual sitting of such court, unless sued with any other person; but the clause creating the exception was omitted in the code of civil procedure; and the former rule only exempting attorneys and counselors, when employed in some cause pending, and then to be heard in such court. (*Cole v. McClellan*, 4 Hill. 59).

A prisoner, or the officer having him in custody, is not liable to arrest, in any civil action or special proceeding, while passing through another county. (Co. Civ. Proc. § 119). A person under arrest on a justice's warrant, who has been arrested in one county on a

criminal warrant, and who is being conveyed through another county, to the place where he is to be taken according to the command of the process, is privileged from arrest in civil process, in the county through which he passes. (*Love v. Humphrey*, 9 Wend. 204). Where a defendant was arrested on a pretended criminal charge, in order to detain him until he could be arrested in a civil action, on his being so arrested, the court set aside the order of arrest. (*Benninghoff v. Oswell*, 37 How. Pr. 235). A person convicted and fined upon a criminal charge, is not privileged from arrest in a civil action for a reasonable time to return home after the criminal trial. (*Lucas v. Albee*, 1 Den. 666). A party is not liable to arrest in this country for acts done by him as sovereign of another nation. (*Hatch v. Baez*, 7 Hun, 596).

A person who is enticed into the state by any subterfuge, scheme or pretense, which is not warranted by law, for the purpose of arresting him, is privileged from such arrest. (*Smith v. Meyers*, 1 T. & C. 665). In a later case, where a defendant was extradited from another state on an indictment for grand larceny, and had been tried here and acquitted, he was permitted to be arrested at the suit of the party who procured the indictment and extradition, in a civil action here, where it did not appear that there was any bad faith in causing the extradition. (*Browning v. Abrams*, 51 How. Pr. 172; *Adriance v. Lagrave*, 59 N. Y. 110; see, however, *Matter of Reinitz*, 23 Abb. N. C. 69). The exemption from arrest is a personal privilege, and may be waived, and it is waived when the party or witness fails to claim it within a reasonable time, or makes a general appearance in the action. (*Stewart v. Howard*, 15 Barb. 26; *Petrie v. Fitzgerald*, 1 Daly, 401; *Farmer v. Robbins*, 47 How. Pr. 415); but giving bail is not a waiver of his right to be discharged. (*Mackay v. Lewis*, 7 Hun, 83).

The court has power, independent of the statute, to protect its officers, suitors and witnesses from molestation by means of process of the court. (*Lamkin v. Starkey*, 7 Hun, 479).

ARTICLE III.

ORDER OF ARREST.

SECTION.

1. Papers necessary to obtain the order.
2. When and by whom granted.
3. Contents of the order.
4. How vacated or modified.

Sec. 1. Papers Necessary to Obtain the Order.

Subdivision 1.—THE AFFIDAVIT.

The order may be granted, in a case specified in section five hundred and forty-nine of the code of civil procedure, where it appears by the affidavit of the plaintiff or any other person, that a sufficient cause of action exists against the defendant, as prescribed in that section. It may be granted, in a case specified in section five hundred and fifty of the code of civil procedure, upon the like proof that a sufficient cause of action exists against the defendant, as prescribed in that section, and of the other matter, extrinsic to the cause of action, specified in that section. The affidavit may also contain any statement, tending to determine the amount of bail to be required. (Co. Civ. Proc. § 557). It was formerly held that an order could not be procured on the pleadings, and that an affidavit was necessary (*Corwin v. Freeland*, 6 N. Y. 560); but by the code of civil procedure (§ 3343, subd. 11) the word "affidavit" includes a verified pleading in an action, or a verified petition or answer in a special proceeding. So, a sworn complaint may be considered as an affidavit; and if the complaint and affidavit together are sufficient to warrant the order, although the affidavit alone would not be sufficient, the order will be sustained. (*Palmer v. Hussey*, 59 N. Y. 647). To give the court jurisdiction to issue an order of arrest against a person, the facts relied upon must be presented by the affidavit of the plaintiff, or some other person, and the affidavit required is a statement or declaration, reduced to writing, and verified before an officer, having

authority to administer an oath of affirmation. (*Bowen v. Stilwell*, 9 Civ. Proc. Rep. 277). It would seem that a complaint need not necessarily be one of the papers upon which an order of arrest is granted, save in those instances where the code of civil procedure provides for the arrest only where certain facts "are alleged in the complaint;" it is a natural inference that the law-makers intended a complaint to be presented to the court or judge, of whom the order is asked, before the order should issue, in such cases. (*Engelhardt Co. v. Benjamin*, 2 App. Div. 91; *Lawrence v. Foxwell*, 4 Civ. Proc. Rep. 451). In arrests for causes as to which no such statutory provision is made, it is apprehended that the mere affidavit is sufficient. If there be both a complaint and affidavit, they must be consistent with each other (*Wicker v. Harmon*, 21 How. Pr. 462); and if there is any variance, the affidavit is to control. (*Dreyfus v. Otis*, 54 How. Pr. 405. The complaint may be used in furtherance of the affidavit, in a case where the affidavit alone, would not be sufficient to warrant the order of arrest. (*Hatch v. Ransom*, 4 Law Bull. 5). The affidavit, however, must be in accordance with the requirements of law; so, where an affidavit upon which an order of arrest is granted, was verified out of the state, and the certificate to the notary's jurat does not conform to section eight hundred and forty-four of the code, the affidavit is a nullity, and the order should be vacated; the defect is jurisdictional. (*Harris v. Durkee*, 5 Civ. Proc. Rep. 376). The omission of the title of the action from an affidavit for an order of arrest does not impair its effect, provided it intelligibly refers to the action. (*Lamkin v. Oppenheim*, 86 Hun, 27). Substantial compliance with the statute is held sufficient. (*Ross v. Wigg*, 34 Hun, 192). The statement of facts required by the code, should be made with particularity; and it is not enough to state the facts generally, or in the language of the statute. (*Draper v. Beers*, 17 Abb. Pr. 163). The affidavit must generally be positive, and make out a *prima facie* case against the defendant, before the order should be granted. (*Griswold v. Sweet*, 49 How. Pr. 171). The

judge must be satisfied judicially from the affidavits that a cause of action exists, and that it is a proper cause for an arrest. (*Crandall v. Bryan*, 15 How. Pr. 48). An affidavit upon information and belief is generally clearly insufficient; but some of the material facts may be stated upon information and belief, where the affidavit states the nature, the quality, and the means of the information, so that the judge can be able to see that this belief is well founded. (*Dreyfus v. Otis*, 54 How. Pr. 405; *Ammon v. Kellar*, 21 Misc. 442). An affidavit wholly on information and belief, stating the sources of affiant's information and the grounds of his belief to be a certain cablegram, is insufficient where the message does not show what knowledge of the facts the sender had. (*Banque Agricole v. Ungureau*, 53 App. Div. 254). The affidavit should state correctly what is alleged on information, and what on deponent's own knowledge. (*Moore v. Calvert*, 9 How. Pr. 474). Where the order is asked on affidavits made on information and belief, it should be shown why affidavits by persons having actual knowledge cannot be produced. (*Martin v. Gross*, 56 N. Y. Superior Ct. Rep. 512). If this is not shown the order should not be granted. (*Richters v. Littell*, 21 Wk. Dig. 133). Affidavits made as of personal knowledge are not sufficient, where the court can see that the affiant had not such knowledge. (*Finlay v. Castroverde*, 68 Hun, 59). Legal conclusions arising from the facts stated, need not be stated (*Hitchcock v. Peterson*, 14 Hun, 389); nor need a fact be stated which can be clearly inferred from the allegations made in the affidavit. (*Meyer v. Belden*, 8 Wk. Dig. 344). One false representation is enough to sustain an arrest, if of a character to materially influence the giving credit, and if it was made with the intention to deceive (*Wannemacher v. Davis*, 2 Sweeny, 272); but that misrepresentation should be specifically stated, and the respects wherein it is false, particularized. (*Cummings v. Wooley*, 16 Abb. Pr. 297, note).

• When the information is derived from written instruments, the papers themselves, or authenticated copies thereof should be furnished to the court, if they can be procured.

(*DeWeerth v. Feldner*, 16 Abb. Pr. 295). In an action for malicious prosecution, an affidavit is insufficient when it states only in general terms the existence of malice, and want of probable cause; and facts should be set forth. (*Grimes v. Davison*, 2 Abb. N. C. 457). Where the plaintiff in such an action states in his affidavit, that the complaint in such former action was immediately dismissed by the magistrate, he shows a *prima facie* case. (*Gould v. Sherman*, 10 Abb. Pr. 411). In an action for deceit, where the ground of recovery is fraud, if the plaintiff swears to a good cause of action, he is entitled to the order of arrest. (*Ely v. Mumford*, 47 Barb. 629). Where the facts authorizing the arrest are stated positively, not on information and belief, and are not such that the affiant could not have sufficient knowledge to verify, and these facts are not denied after the defendant had an opportunity to do so, they will justify an arrest; and an appellate court, sitting in review of the order, may take the facts as stated. (*Pier-son v. Freeman*, 77 N. Y. 589). In an action to recover a chattel, it must appear that a cause of action exists, and that it comes within subdivision two of section five hundred and forty-nine, of the code of civil procedure or else an order of arrest will not be authorized. (*Muller v. Perrin*, 14 Abb. Pr. N. S. 95). If the facts are such in an action for conversion that if they remain uncontradicted on the trial, the plaintiff would be entitled to go to the jury on the question of conversion, an order of arrest will be sustained. (*Woodbridge v. Nelson*, 13 Hun, 390). Formerly, putting in and perfecting bail waived all defects in the affidavit (*Stewart v. Howard*, 15 Barb. 26); but perfecting bail is no longer a waiver of such defects. (*Knickerbocker L. Ins. Co. v. Ecclesine*, 34 Super, 76). The defendant has until final judgment to move to vacate the order; and in any case he has twenty days after the arrest to make such application. (Co. Civ. Proc. § 567). A failure to state that no previous application for the order has been made, as required by Rule 25, does not compel the court to refuse to grant the order, or to vacate it after it has been granted. (*Bean v. Tonnelle*, 24 Hun, 353). The prac-

tice of presenting a single set of affidavits, entitled in several actions by different plaintiffs against the same defendants, for the purpose of obtaining separate orders of arrest, is not to be encouraged. (*Whitney v. Hoffstadt*, 21 Wk. Dig. 197).

Subdivision 2.—THE UNDERTAKING.

Except where the action is brought for a cause specified in subdivision three of section five hundred and forty-nine of the code of civil procedure, or in a case where it is specially prescribed by law that security may be dispensed with, or the security to be given is specially regulated by law, the judge, before he grants the order, must require a written undertaking on the part of the plaintiff, with two sufficient sureties, to the effect that, if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to the order of arrest, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which must be at least equal to one-tenth of the amount of bail required by the order, and not less than two hundred and fifty dollars. (Co. Civ. Proc. § 559). The mere fact that the undertaking is in too small a sum, will not justify vacating the order, but a sufficient undertaking may be ordered to be filed, as a condition of affirming the order. (*Danenbaum v. Mandelbaum*, 16 Wk. Dig. 502; *affd.* 94 N. Y. 648). The sureties must make affidavit to the undertaking, in the form required by section eight hundred and twelve of the code of civil procedure, and if they neglect to swear severally, that they are each worth the amount specified in the affidavit, exclusive of property exempt by law from levy and sale under execution, the affidavit is defective, and the order will be set aside. (*Thompson v. Friedberg*, 54 How. Pr. 519). The giving of an undertaking is an absolute necessity, where required, to confer jurisdiction upon the judge to grant the order, and without it the order is void. (*Newell v. Doran*, 21 How. Pr. 427). Any informality in the execution of the undertaking may be

cured by amendment *nunc pro tunc* in the discretion of the court (*Bellinger v. Gardiner*, 12 How. Pr. 381); the omission of the acknowledgment, if the undertaking be otherwise sufficient, may be amended by leave of the court (*Conklin v. Dutcher*, 5 How. Pr. 386), and any defect in form, or deficiency in amount, may be amended on motion to vacate the order of arrest, or on appeal, by the substitution of a proper undertaking on terms. (*Bauer v. Schevitch*, 11 Civ. Proc. Rep. 433). It was held in *Bondy v. Collier* (13 Misc. 15) that the court had no power to amend an undertaking defective in that its accompanying affidavit did not show the sureties to be residents or freeholders or householders; this decision was put upon the ground that, while the court could amend an undertaking, it could not order a new undertaking to be given and still continue the existence of the order of arrest. It is apprehended that this case does not represent the law. By virtue of section 730 of the code of civil procedure there seems to be ample authority to correct any such errors as appeared in the *Bondy* case, although the amendment is accomplished by the execution of a new undertaking. (*Irwin v. Judd*, 20 Hun, 562; *Corn Ex. Bk. v. Blye*, 102 N. Y. 305, 308; *Bauer v. Schevitch*, 11 Civ. Proc. Rep. 433). A defendant, who has procured the order of arrest to be vacated, may bring an action on the undertaking given on obtaining the order of arrest in accordance with section 559, without waiting for final judgment. (*Krause v. Rutherford*, 45 App. Div. 132); and the defendant need not obtain leave of the court, under section 814 of the code of civil procedure, to bring the action. (*Id.*). In such an action the rule of damages is not the same as in a case of false imprisonment; such an undertaking is not to provide for a personal wrong or injury, but is a paper designated to cover taxable costs to be awarded in the action, and such other legitimate damages as flow from the arrest, such as counsel fees and moneys expended to vacate the arrest and loss of time occasioned the arrested party in getting bail and in moving for his discharge. (*Bamberger v. Kahn*, 43 Hun, 411). It has been held, by the general term of the court of

common pleas of New York city and county, that the undertaking does not cover all the costs of the action, but only such costs awarded to the defendant as accrue directly from the arrest, or in proceedings in the action, or otherwise, necessitated by the arrest. (*Sutorius v. North*, 13 N. Y. Supp. 557; S. C. on another appeal, 1 Misc. 298; *Sperry v. Hellman*, 13 N. Y. Supp. 899; motion for re-argument denied, 16 N. Y. Supp. 954). It seems that this rule is too narrow, however, and that all taxable costs should be recovered in such a suit in accordance with the *dictum* in *Bamberger v. Kahn* (*supra*), which was quoted with approval in *Krause v. Rutherford* (*supra*). See also *Spang v. Patterson* (25 Misc. 536). An order entered upon the consent of the parties vacating an order of arrest, is not, without more, such a final decision against the right to the order of arrest as will support an action on the undertaking. (*Hallen v. Jones*, 2 Misc. 249). A *vacatur* of the order upon the merits (the time to appeal having expired) is such a final decision (*Squire v. McDonald*, 2 Misc. 422; appeal dismissed, 138 N. Y. 554; *Allaire v. Kalfon*, 20 App. Div. 546); and even a *vacatur* upon the papers on which the order of arrest was granted, though not upon the merits. (*Krause v. Rutherford*, 45 App. Div. 132). Of course the action may be brought against the sureties immediately without pursuing the original plaintiff. (*Candee v. Wilson*, 14 Wk. Dig. 378).

Where the order can be granted only by the court, an undertaking on the part of the plaintiff, may be dispensed with. If it is required, its form, and the security to be given thereupon must be such as the court prescribed. (Co. Civ. Proc. § 560). The section last cited, contains the provision as to undertakings in case of arrest in the nature of *ne exeat*.

Sec. 2. When and by Whom Granted.

An order for the arrest of the defendant, except as otherwise prescribed in section five hundred and fifty-one of the code of civil procedure, must be obtained from

a judge of the court in which the action is brought, or from any county judge. (Co. Civ. Proc. § 556). The exception provided for by this section refers to the substitute for the writ of *ne exeat*, contained in section five hundred and fifty of the code; and in a case specified in section five hundred and fifty, the order of arrest can be granted only by the court, is always in its discretion, and may be granted or served, either before or after final judgment, unless an appeal from the judgment is pending, upon which security has been given, sufficient to stay the execution thereof. In either of the cases specified in section five hundred and forty-nine, the order cannot be served after final judgment; but it may be granted where a proper case therefor is presented, at any time before final judgment. (Co. Civ. Proc. § 551). Where an order of arrest was not applied for until after the trial and the decision of the court, but it was made and served before final judgment, it was held in time. (*Humphrey v. Hayes*, 94 N. Y. 594, 604). A judgment by default is a final judgment; but where the default is opened, and the defendant allowed to come in and defend, but the judgment left to stand as security, an order of arrest may be made. (*Mott v. Union Bank of N. Y.*, 38 N. Y. 18). Subject to the provisions of section five hundred and fifty-seven of the code (which refers to the proof necessary to procure the order), the order may be granted at any time after the commencement of the action. It may also be granted to accompany the summons, * * * but where the order is applied for after the filing or service of the complaint, the court, before granting the same, may without notice, direct the service of an amended complaint, so as to conform to the allegations required in subdivisions two and four, of section five hundred and forty-nine of the code. (Co. Civ. Proc. § 558).

In a case specified in section five hundred and fifty, the order of arrest can be granted only by the court (Co. Civ. Proc. § 551); but this general rule is subject to the exception that in the first judicial district, a motion, which elsewhere must be made in court, may be made to a judge out of court, except for a new trial on

the merits. (Co. Civ. Proc. § 770). Section seven hundred and seventy of the code is applicable to a case specified in section five hundred and fifty; and in the first judicial district, an order of arrest under that section may be granted by a judge out of court. (*Boucicault v. Boucicault*, 21 Hun, 431; S. C., 59 How. Pr. 131). The order in such case should not recite that it was made in court at a special term, nor should it be in the form of an order of the court. (*Lachenmeyer v. Lachenmeyer*, 26 Hun, 542; appeal dismissed, 89 N. Y. 632). An order under section 550, cannot be issued by a county judge, of course, but one under section 549 may. (Co. Civ. Proc. §§ 551, 556). The language of the code of procedure was "a county judge." (Co. Civ. Proc. § 180). Under that section it was held that "county judge" meant the judge of the county where the action is triable. (*Chubbuck v. Morrison*, 6 How. Pr. 367). The word "a" is changed to "any" in section five hundred and fifty-six of the code of civil procedure, as also in section six hundred and six (relating to injunctions), and section six hundred and thirty-eight (in regard to attachments), for the purpose of settling a disputed question; and is in accordance with the case of *Kennedy v. Simmons* (1 Hun, 603), which holds that an order of arrest may be granted by a county judge, in an action in the supreme court, although it is not triable in his county and though the attorney for the moving party does not reside therein. (*Webb v. Bailey*, 54 N. Y. 164). The acting county judge may grant the order. (*Seymour v. Mercer*, 13 How. Pr. 564). A judge of the former court of common pleas of the city and county of New York, was held to be a county judge within this section. (*People ex rel Ireland v. Donohue*, 15 Hun, 446). Any county judge, during the period that he is in a county other than his own, for the purpose of holding courts therein, has all the powers of the county judge of such county. (Laws of 1877, Chap. 11). In all cases, it is left to the discretion of the court or judge to grant or refuse the order, and formerly this discretion could not be reviewed upon a motion to vacate the order (*Lapeous v. Hart*, 9 How.

Pr. 541); but in a later case, the court held, that this discretion may be reviewed on such a motion (*Griswold v. Sweet*, 49 How. Pr. 171), and such is now the common and well-established usage. (See *Levy v. Bernhard*, 2 App. Div. 336).

Sec. 3. Contents of the Order.

The order must be subscribed by the plaintiff's attorney, and, except where it is granted by the court, by the judge. It may be directed, either to the sheriff of a particular county, or, generally, to the sheriff of any county. It must require the sheriff forthwith to arrest the defendant, if he is found within his county; to hold him to bail in a specified sum; and to return the order, with his proceedings thereunder, as prescribed by law. The plaintiff's attorney may, at his option, by an indorsement upon the order, or, where it was granted by the court, upon the copy thereof delivered to the sheriff, fix a time within which the defendant must be arrested; in that case he cannot be arrested afterwards, under the same order. (Co. Civ. Proc. § 561). Every order of arrest shall briefly state the grounds on which it is granted. (General Rule 13). It is a sufficient statement under Rule 13, in the order of arrest, that it is for the appropriation of money received in a fiduciary capacity. (*Bowman v. Gates*, 11 Reporter, 744). The recital of the grounds on which the order is granted must not be in the alternative (*Cronin v. Crooks*, 143 N. Y. 352); but a definition of embezzlement, as "fraudulently misapplied," put in the form of an alternative, does not contravene this principle. (*Quail v. Nelson*, 39 App. Div. 18). It should contain a recital of the section and subdivision of the code, under which it is issued; an omission, however, in this respect is not fatal. (*Tracy v. Veeder*, 35 How. Pr. 209). The requirement that the order shall be subscribed by the plaintiff's attorney is imperative. (*Thompson v. Friedberg*, 54 How. Pr. 519). An irregularity in that respect may be amended. (*Mather v. Hannaur*, 55 How. Pr. 1).

Sec. 4. How Order Vacated or Modified.**Subdivision 1.—TIME WITHIN WHICH DEFENDANT MAY APPLY.**

Except where an order of arrest can be granted only by the court, a defendant, arrested as prescribed in this title, may, at any time before final judgment, or if he was arrested within twenty days before final judgment, at any time within twenty days after the arrest, apply to vacate the order of arrest; or to reduce the amount of bail; or to increase the security given by the plaintiff; or for one or more of those forms of relief, together, or in the alternative. In a case where the order of arrest can be granted only by the court, a like application may be made, at any time within twenty days after the arrest; and an application to increase the security given by the plaintiff, may be made at any time before final judgment. (Co. Civ. Proc. § 567).

Under the code of procedure the defendant had to apply to vacate the order, before justification of bail. (Code of 1848, § 179). This time was extended by an amendment of the code in 1858, giving the defendant until final judgment to make the application. (Co. Proc. § 204). In 1862 the time was again extended, so that the defendant might move to vacate the order within twenty days after it was served. (Co. Proc. § 183). Under that provision, it was held that the motion may be made after judgment, if within twenty days after service of the order (*Pelo v. Clukey*, 36 How. Pr. 179), although the two sections last cited were both in force at the same time. (*Farmer v. Robbins*, 47 How. Pr. 415). The code remained in that condition until 1877, when the two sections were consolidated into section five hundred and sixty-seven of the code of civil procedure, as given above; which section, although amended in 1877, has not been changed, in regard to the time within which a motion may be made, since that time. The motion to vacate an order of arrest, before the service of the order, or of the summons and complaint, upon a single affidavit that

the plaintiff has no cause of action, and that the bail is excessive, has been held to be premature. (*Gedney v. Haas*, 50 How. Pr. 310). Such a motion cannot be made, it has, likewise, been held, until the order is served. (*Kern v. Rackow*, 44 How. Pr. 443). It will be noted that in both of these special term decisions the motion was made on affidavits read by the defendant—not simply on the papers on which the order was granted. It is apprehended that a motion of the latter character can be made before an actual arrest has been made. (*Martin v. Gross*, 56 N. Y. Super. Ct. Rep. 512). This case was severely criticised in the dissenting opinion in *Staub v. Myers* (16 App. Div. 476, 477, 478), but it is believed that the doctrine laid down in *Martin v. Gross* (*supra*) is correct. There can be no question that section 567 of the code of civil procedure, when read literally, does seem to require a postponement of the motion until after the arrest has actually been made; the language, it will be remembered, is: “A defendant *arrested* as prescribed in this title, may * * * apply to vacate the order, etc.” But the object of that section is, plainly, to provide a time *subsequent* to which no motion to vacate can be made; the framers of the statute were not dealing with the question of *how soon* the application to vacate could be made. Moreover, section 568 provides that the application can be made upon the papers on which the order was granted alone, and in those papers it does not appear whether the defendant has been arrested or not, so that, if the doctrine laid down in the dissenting opinion in *Staub v. Myers* (*supra*) be correct, this portion of section 568 is nullified. It appears in that dissenting opinion that there was nothing in the record in that case to show whether the defendant had been arrested or not. One of the inherent powers of a court is to vacate its own orders. (*Martin v. Gross* (*supra*)) must be considered correct on authority and principle, therefore. When defendant has once moved, he will not be permitted to renew his motion, without leave of the court on good cause shown. (*Lovell v. Martin*, 21 How. Pr. 238). The right to make this motion, is

not waived, by obtaining an extension of time to answer (*Col. Ins. Co. v. Force*, 8 How. Pr. 353); nor by perfecting bail. (*Mackey v. Daniel*, 7 Hun, 83). When a motion to vacate an order is denied, with leave to renew the time within which to make the second motion is not extended beyond the original time; viz., at any time before final judgment, or within twenty days after the arrest. (*Wheeler v. Brady*, 2 Hun, 347). Where an order of arrest was vacated by the dismissal of the complaint, and the judgment of dismissal was afterwards reversed, the original order of arrest, is not thereby revived; when once dead it is gone forever. (*Bowman v. Bowe*, 40 Hun, 489; *People ex rel Roberts v. Bowe*, 81 N. Y. 43). At any time after the filing or service of the complaint, the order of arrest must be vacated on motion, if the complaint fails to set forth a sufficient cause of action, as required by section five hundred and forty-nine of the code. (Co. Civ. Proc. § 558). This section and section 567 are not conflicting; ordinarily the time within which the motion to vacate must be made, is determined by section 567, but an exception is made where the complaint is insufficient under the especial provisions of section 549; where such is the fact, the motion may be made at any time. (*N. H. W. Co. v. Ferris*, 125 N. Y. 364; S. C. 35 N. Y. St. Rep. 283). Except where an order of arrest can be granted only by the court, a defendant, arrested before answer, has twenty days after the arrest, in which to answer the complaint. The judgment must be stayed accordingly. (Co. Civ. Proc. § 566).

Subdivision 2.—HOW APPLICATION IS MADE.

An application, specified in section five hundred and sixty-seven of the code of civil procedure, may be founded only upon the papers upon which the order was granted; in which case, it must be made to the court, or if the order was granted by a judge out of court, to the same judge in court or out of court, and with or without notice, as he deems proper, and the application must be heard upon those papers only. Or

it may be founded upon proof by affidavit, on the part of the defendant; in which case, it must be made to the court, or, if the order was granted by a judge out of court, to any judge of the court, upon notice; and it may be opposed by new proof, by affidavit, on the part of the plaintiff, tending to sustain any ground of arrest recited in the order, and no other, unless the defendant relies upon a discharge in bankruptcy, or upon a discharge or exoneration, granted in insolvent proceedings; in which case, the plaintiff may show any matter in avoidance thereof, which he might show upon the trial. (Co. Civ. Proc. § 568). The defendant may elect whether he will informally demur to the plaintiff's case, set forth in the original affidavit, as insufficient, or open the merits of the whole controversy, by moving on counter affidavits. (*Evans v. Holmes*, 46 How. Pr. 515). He can not pursue both courses at once. (*Id.*; *Hinck v. Desser*, 3 N. Y. St. Rep. 349). If he moves on the plaintiff's papers, he admits them to be true. (*Hathorn v. Hall*, 4 Abb. Pr. 227; *Lovell v. Martin*, 21 How. Pr. 238). On such a motion, the order of arrest or a copy thereof, and the papers upon which it was founded, must be presented to the court; an affidavit stating generally their contents, is not sufficient. (*Kern v. Rackow*, 44 How. Pr. 443). If the papers, on which the order was granted, show that the court has not jurisdiction, the order will be vacated on motion. (*Am. Union Tel. Co. v. Middleton*, 80 N. Y. 408). If the complaint shows no cause of action, the plaintiff should not be allowed to amend *nunc pro tunc*, for the purpose of upholding the arrest. (*South Inl. Nav. & Imp. Co. v. Sherwin*, 1 Civ. Proc. Rep. 44). If it shows a different cause of action, from that on which the order was obtained, the order cannot be upheld. (*Chambers v. Durand*, 33 Super. 494). The order must stand or fall upon the original cause of arrest, with such corroborative proof as may be furnished on the motion to vacate. (*Id.*). So, where a demurrer to the complaint on account of misjoinder of parties plaintiff is sustained, the order of arrest must be vacated. (*Gray v. Rothschild*, 48 Hun, 596; S. C., 14 Civ.

Proc. Rep. 320; *affd.* 112 N. Y. 669). A mere technical defect in the motion papers as omitting to state that there had been no previous application, as required by supreme court rule twenty-five, may be corrected. (*Spring v. Gourlay*, 1 Law Bull. 49). A *dictum* in the case of *Welch v. Winterburn* (14 Hun, 518) gave rise to decisions that, where the cause of action and the grounds of arrest are identical, the merits of the controversy should not be determined on affidavits (*Peck v. Lombard*, 22 Hun, 63; *Miller v. Parks*, 66 How. Pr. 159); but this doctrine has been abandoned and now, whatever identity there may be between the grounds of arrest and the cause of action, the court will carefully examine the affidavits on a motion to vacate the order and dispose of the motion according to the just preponderance of proof. (*Bailey v. Prince*, 24 N. Y. St. Rep. 632; *Hayes v. Beard*, 37 Id. 535; *Levy v. Bernhard*, 2 App. Div. 336). Where it appears that no cause of action exists, though the alleged cause of action and the grounds of arrest are identical, the order may be vacated. (*Dixon v. Beach*, 1 Law Bull. 38). If the defendant moves on new affidavits, plaintiff may sustain the order by affidavits substantiating points not attacked by the defendant's papers (*Ballard v. Fuller*, 32 Barb. 68); as by showing concurrent frauds, as proof of the particular fraud charged. (*Id.*). On such motion the question is, whether upon the whole case, as made by the affidavits on both sides, the court if called upon to act *res nova*, would grant the order of arrest; if it would, then the motion to vacate should be denied; but if, after hearing both parties, it should appear that a case for arrest has not been made out, the order should be vacated. (*Chapin v. Seeley*, 13 How. Pr. 490). Where the defendant is privileged from arrest, he must be discharged from arrest, upon proof by affidavit, of the facts entitling him to the discharge; and the court or judge, may make the order without notice, or may require notice to be given to the sheriff, or to the plaintiff, or to both. (Co. Civ. Proc. § 564). Section five hundred and sixty-eight of the code of civil procedure, provides to whom the

application to vacate an order of arrest must be made. That section should be construed with sections seven hundred and seventy, seven hundred and seventy-two and seven hundred and seventy-three of the code of civil procedure. Formerly a county judge had no power to hear a motion on notice, to vacate an order of arrest (*Rogers v. McElhone*, 20 How. Pr. 441); but that rule was changed by section five hundred and sixty-eight, so that where the order was granted by a county judge, he may, with or without notice, hear the motion to vacate the order. Upon an application to vacate an order of arrest, it is not proper to reduce the amount of bail, unless that relief is also asked in the notice of motion. The questions involved in the two motions are distinct and independent of each other, and rest upon different facts; but in a proper case, and where the proper relief is asked, the two motions may be united in one application, if each relief is asked in the notice of motion; or a separate motion may be made for each relief. (*Heymann v. Mittlestaedt*, 2 N. Y. St. Rep. 645).

Subdivision 3.—WHERE DEFENDANT MAY APPLY.

It is held that the question of place was not involved in section five hundred and sixty-eight of the code, and that it must be read with section seven hundred and sixty-nine, which provides where motions upon notice must be heard; and that unless such a construction is had, great abuse and embarrassment would follow. (*Sutton v. Sabey*, 22 Hun, 557). Section seven hundred and sixty-nine only applies to motions made on notice. (*Hull v. Hart*, 14 Wk. Dig. 255). If an application is made without notice, to vacate an order of arrest, granted by a judge of the court; it must be made to the same judge; there is no power in a court or any other judge, without notice, to vacate such an order. (*Van Kleek v. Nichols*, 63 How. Pr. 403; *Jordan v. Harrison*, 13 Civ. Proc. Rep. 445).

Subdivision 4.—STIPULATION NOT TO SUE.

When the defendant is entitled to have an order of arrest vacated, not as a matter of favor, but on the plaintiff's own papers, because the action is not one in which the order of arrest can be issued, the court has no power to compel the defendant to stipulate that he will not sue for false imprisonment. (*Tompkins v. Smith*, 1 Civ. Proc. Rep. 398; 48 Super. 113; 89 N. Y. 602). This seems to have been the rule uniformly adopted by the courts, in cases where the defendant had an absolute right to the relief sought. The court of appeals says, that where the right existed to have the order vacated, the court has no power to restrain a party from bringing his action; the rule which forbids the imposition of a condition, is confined to those cases where the process is void, and an absolute nullity from the beginning; and a merely erroneous process stands valid or good, until it is reversed; the right to sue for false imprisonment in the latter case, only accrues upon the exercise of the authority of the court, and the court may sometimes impose a condition on the defendant not to sue. (*Matter of Bradner*, 87 N. Y. 171). Where the order is vacated for favor, or because it is erroneous, but not void, or upon conflicting affidavits, and the court is satisfied that the arrest was without malice, and upon probable cause, it will, in its discretion, impose the condition that the defendant stipulate that he will not bring an action for the arrest. (*Wilder v. Guernsey*, 19 Alb. Law J. 401). The same rule is applied to a case where the defendant has been arrested on execution. (*Chapin v. Foster*, 101 N. Y. 1).

Subdivision 5.—SUPERSEDEAS.

Except in a case where an order of arrest can be granted only by the court, if the plaintiff unreasonably delays the trial of the action, or neglects to enter judgment therein, within ten days after it is in his power to do so, or neglects to issue execution against the person of the defendant, within ten days after the return of

the execution against the property, and in any event, neglects to issue the same within three months after the entry of the judgment, or whenever it shall appear to the satisfaction of the court, that the plaintiff in an action, or a judgment creditor in a judgment, delays the enforcement of his remedies therein by collusion, or for the purpose of allowing the debtor to remain in prison, under the mandate in any other action, before the issuing of the mandate in favor of such creditor, so as to produce a continued and extended imprisonment, by virtue of the separate mandates in the different actions, the defendant must upon his application, made upon notice to the plaintiff, be discharged from custody, if he has already been taken under the mandate against him in such action; or if he has not yet been imprisoned therein, be relieved from imprisonment by virtue of such mandate, by the court in which the action was commenced, unless reasonable cause is shown why the application should not be granted. A defendant, discharged as prescribed in this section, shall not be arrested upon an execution, issued upon the judgment in the action. (Co. Civ. Proc. § 572). The above section is given, as amended by chapter 672 of the laws of 1886. The object of the legislature in amending that section was to prevent collusion on the part of the plaintiff, or of the judgment creditor, by delaying the enforcement of his remedies and thereby producing a continued and extended imprisonment; and to give the defendant the power, upon notice to the plaintiff, to obtain his discharge, and to have an order or arrest before judgment, or an execution, superseded. This right of the defendant by the amendment of 1886, is brought down to ten days after the plaintiff has the right to enter judgment, or issue execution, or within ten days after the return of the execution against the property; and is extended to a case where the plaintiff unreasonably delays the trial of the action; to further carry out the idea of preventing an imprisonment for debt beyond a very limited term, and to interpose a legal obstacle in the way of a revengeful plaintiff's keeping a defendant locked up an indefinite

length of time, or so long as his spite should last. It is to be borne in mind, however, that an arrest or an execution against the person, is not *void* if in contravention of the provisions of section 572, in point of time; the right given to the defendant, by this section, is to make an application to the court to be discharged from custody, etc., and the arrest, or execution against the person, is valid until the court acts on such an application. (*Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 288; appeal dismissed, 159 N. Y. 574).

The relief designed by this section is to secure the release of persons held under orders of arrest, where the diligence required by the statute was not used by the plaintiff in charging the defendant by execution. (*Redney v. Jewett*, 72 Hun, 598; *Hedges v. Payne*, 85 Hun, 377; *affd. on opinion below*, 146 N. Y. 397). The word "mandate" means "order of arrest" (*Id.*), and the whole section is applicable only where an order of arrest has been issued. (*Id.*; *Sweet v. Norris*, 12 Civ. Proc. Rep. 175; 45 Hun, 595; 110 N. Y. 688). The last sentence of the section does not prohibit the arrest, upon an execution, of a person who has been arrested under an order and discharged upon giving bail. (*Id.*). The requirements of the section are not peremptory, but a denial of the motion to discharge is authorized where a good excuse for the delay is shown. (*Hobbs v. Bashford*, 19 N. Y. St. Rep. 389; *DeSilver v. Holden*, 54 N. Y. Super. Ct. Rep. 1; *Longuemare v. Nichols*, 23 Abb. N. C. 221; *People ex rel Crane v. Grant*, 13 Civ. Proc. Rep. 209). Section one hundred and eleven of the code of civil procedure was enacted by chapter 672, laws of 1886, to provide for the discharge of prisoners who were confined under execution, or any other mandate against the person, after a period of three or six months, according as the amount of the indebtedness is over or under five hundred dollars. But that section was held only to apply to executions or mandates to enforce a payment of money, issued after final judgment or order, and not to apply to, or include orders of arrest. (*N. Y. C. & H. R. R. Co. v. Shepherd*, 10 Civ. Proc. Rep. 153; *Matter of Shepard*, 43 Hun, 287). By its own terms,

it does not apply to a case of commitment for contempt of court, except in the single case of contempt in the non-payment of alimony or counsel fees, in a divorce case. Formerly the supersedeas would not be issued, except where the defendant was in actual confinement, and was held to afford relief, to persons undergoing close confinement only. (*Watt v. Healey*, 22 Hun, 491). The statute, however, gives the relief not only to those in actual confinement, but to those within the jail liberties, on bail. (Co. Civ. Proc. §§ 111, 572; laws 1886, chapter 672, § 7).

ARTICLE IV.

ARREST, WHEN AND HOW MADE.

The sheriff must execute the order, by arresting the defendant, if he is found within his county, and keeping him in custody, until discharged by law. (Co. Civ. Proc. § 563). The arrest must be made within the county, within which the officer is authorized to act. (*Farmers' L. & T. Co. v. Dickson*, 17 How. Pr. 477). It may be made by the sheriff, or any deputy sheriff. (*Hunt v. Burrel*, 5 Johns. 137). The arrest must be made by an actual assumption of control over the person of the defendant, and the consequent restraint of his personal liberty; but it need not be a manual touching of the body, or actual force. (*Gold v. Bissell*, 1 Wend. 210). The plaintiff's attorney may, at his option, by an indorsement upon the order, or where it was granted by the court, upon the copy thereof delivered to the sheriff, fix a time within which the defendant must be arrested. In that case, he cannot be arrested afterwards, under the same order. (Co. Civ. Proc. § 561). The order of arrest, or where it was granted by the court, a certified copy thereof, subscribed by the plaintiff's attorney; and in either case, the papers upon which the order was granted, with the undertaking, if any, must be delivered to the sheriff who, upon arresting the defendant, must deliver to him a copy thereof. The papers, upon which the order

was granted, with the undertaking, if any, must be filed, with the order of arrest, or a certified copy thereof, at the time prescribed for filing the same, in section five hundred and ninety of the code of civil procedure. (Co. Civ. Proc. § 562). Under the former practice, a failure to serve defendant with a copy of the affidavit, was an irregularity only, and would not entitle the defendant to his discharge (*Barker v. Cook*, 25 How. Pr. 190); and if the originals were perfect, defective copies served on the defendant did no harm (*Bank of Havana v. Moore*, 5 Hun, 624; *Barker v. Cook*, 40 Barb. 254); and a failure to serve an undertaking upon a defendant, was only an irregularity, and did not entitle defendant to his discharge (*Mather v. Hannaur*, 55 How. Pr. 1); but where no undertaking was filed or copy served, the arrest was vacated. (*Lobb v. Hundson*, 1 Law Bull. 69). The language of section five hundred and sixty-two of the code of civil procedure is "must," in place of "shall," and it would seem as though by thus making the section mandatory, the effect would be to make compliance with the section necessary or imperative; and a failure to comply, a ground for vacating the order.

ARTICLE V.

DISCHARGE ON BAIL OR DEPOSIT.

SECTION.

1. When defendant may be discharged.
2. Defendant's undertaking, and justification.
3. Deposit.
4. Liability of sheriff.

Sec. 1. When Defendant may be Discharged.

The defendant, at any time before he is in contempt, where the order can be granted only by the court, or, in any other case, at any time before execution against his person, must be discharged from arrest, either upon giving bail, or upon depositing the sum specified in the order of arrest. The defendant may give bail, or make the deposit immediately upon his arrest, at any hour of the day or night; and he must have reasonable oppor-

tunity to seek for and to procure bail, before being committed to jail. (Co. Civ. Proc. § 573). This is an absolute right; and if the sheriff refuses to accept a sufficient bond, he is liable to an action. (*Richards v. Porter*, 7 Johns, 137). The purpose of the law, is to afford defendant his liberty on giving bail, which will render it reasonably certain that he can be taken in execution, and if he cannot be, that his sureties may be compelled to pay the amount of the execution; and for that reason, the amount of bail should be equal to the amount for which final judgment may be recovered. (*People v. Tweed*, 63 N. Y. 202). The question of the amount of bail is one of discretion for the court below, and its decision is not appealable. (Id.). Where the defendant is actually confined in the jail, by virtue of an order of arrest, and final or interlocutory judgment has been rendered against him in the action, but an execution against his person has not been issued, he may elect to give either a bond for the liberties of the jail, or to give bail, or to make a deposit as prescribed in this article. (Co. Civ. Proc. § 574).

Sec. 2. Defendant's Undertaking, and Justification.

The defendant may give bail, by delivering to the sheriff a written undertaking, in the sum specified in the order of arrest, executed by two or more sufficient bail, stating their places of residence, and occupations, to the following effect:

1. If the order of arrest could be granted only by the court, that the defendant will obey the direction of court, or of an appellate court, contained in an order or a judgment, requiring him to perform the act specified in the order; or, in default of his so doing, that he will, at all times, render himself amenable to proceedings to punish him for the omission.

2. If the action is to recover a chattel, that the defendant will deliver it to the plaintiff, if delivery thereof is adjudged in the action, and will pay any sum recovered against him in the action.

3. In any other case, that the defendant will, at all times, render himself amenable to any mandate, which

may be issued to enforce a final judgment against him in the action. (Co. Civ. Proc. § 575). The provisions of this section are to be distinguished clearly from those of section 149 of the code, covering an undertaking for jail liberties. (*Horowitz v. Olenick*, 62 App. Div. 283).

If the justification of the sureties has been adjourned by stipulation of counsel, the sheriff is liable, if he remands the prisoner to jail, although he acts in good faith. (*Arteaga v. Conner*, 47 Super. 494; 88 N. Y. 403). It is not necessary that the undertaking should be approved, or accompanied with an affidavit of justification of the bail. But the officer taking the acknowledgment of the undertaking, must, if the sheriff so requires, examine under oath, to a reasonable extent, the persons offering to become bail, concerning their property and their circumstances. The examination must be reduced to writing, subscribed by the bail, and annexed to the undertaking. (Co. Civ. Proc. § 576). Within three days after bail is given, the sheriff must deliver to the plaintiff's attorney, copies, certified by him, of the order of arrest, return and undertaking. The plaintiff's attorney, within ten days thereafter, must serve upon the sheriff a notice that he does not accept the bail; otherwise he is deemed to have accepted them, and the sheriff is exonerated from liability. (Co. Civ. Proc. § 577). Leave to except may be granted after the time has expired; but the right of the sheriff to set up the neglect to except in time, in an action brought against him will be reserved. (*Zimm v. Ritterman*, 5 Robt. 618).

Within ten days after the receipt of the notice, the sheriff, or the defendant, may serve upon the plaintiff's attorney, notice of the justification of the same or other bail, specifying the place of residence and occupation of each of the latter, before a judge of the court, or a county judge, at a specified time and place; the time to be not less than five or more than ten days thereafter, and the place to be within the county, where one of the bail resides, or where the defendant was arrested. If other bail are given, a new undertaking must be ex-

ecuted, as prescribed in section five hundred and seventy-five of the code. (Co. Civ. Proc. § 578). So much of section eight hundred and twelve of the code of civil procedure, as requires sureties to justify in double the amount of the undertaking, does not apply to the undertaking of bail. (*Cafiero v. Dematrino*, 6 Wk. Dig. 55).

The qualifications of bail are as follows:

1. Each of them must be a resident of, and a householder or freeholder within the state.

2. Each of them must be worth the sum specified in the order of arrest, exclusive of property exempt from execution; but the judge on justification, may allow more than two bail to justify, severally, in sums less than that specified in the order, if the whole justification is equivalent to that of two sufficient bail. (Co. Civ. Proc. § 579).

A surety, who occupies a portion of a building as an office, is held to be a householder for the purpose of bail. (*Somerset & W. Sav. Bank v. Huyck*, 33 How. Pr. 323). One who has a title to real estate, is a freeholder, irrespective of the amount in value of his interest therein. (*People v. Scott*, 8 Hun, 566). For the purpose of justification, each of the bail must attend before the judge, at the time and place mentioned in the notice, and be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge in his discretion, thinks proper. The judge may, in his discretion, adjourn the examination from day to day, until it is completed; but such an adjournment must always be to the next judicial day, unless by consent of parties. If required by the plaintiff's attorney, the examination must be reduced to writing, and subscribed by the bail. (Co. Civ. Proc. § 580). If the bail do not justify at the time mentioned in the notice, further time may be allowed to justify on good cause shown, and a new notice must be given. (*Burns v. Robbins*, 1 Co. Rep. 62). If they fail to justify, and the sheriff thereupon becomes liable as bail (Co. Civ. Proc. § 589), the sureties cease to have any rights, or privileges as bail. (*Haberstro v. Bedford*, 118 N. Y. 187, 197). If

the judge finds the bail sufficient, he must annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is thereupon exonerated from liability. (Co. Civ. Proc. § 581). The justification is not complete, until the requirements of section five hundred and eighty-one, of the code of civil procedure, are fulfilled. (*O'Neil v. Durkee*, 12 How. Pr. 94). A rejection of one of the bail is a rejection of all; unless the court gives defendant time to procure further bail. (Id.).

Sec. 3. Deposit.

The defendant may, instead of giving bail, deposit with the sheriff, the sum specified in the order. The sheriff must thereupon give the defendant a certificate of the deposit, and discharge him from custody. (Co. Civ. Proc. § 582). If money be deposited in lieu of bail, either by the defendant, or by a third person in his behalf, after judgment, the court cannot order it to be refunded to the third person, but it must be treated as belonging to the defendant, to be applied in payment of the judgment (*Hermann v. Aaronson*, 8 Abb. Pr. N. S. 155); but if the money deposited by a third person was as a security that the sureties would justify, and was not in lieu of bail, the plaintiff cannot have the money applied to his judgment. (*Commercial Warehouse Co. v. Graber*, 45 N. Y. 393). The sheriff must, within four days after the deposit, pay it into court. He must take from the officer receiving it, two certificates of the payment, one of which he must deliver to the plaintiff, and the other to the defendant. For default in making the payment, the official bond of the sheriff may be prosecuted, as in any other case of delinquency. (Co. Civ. Proc. § 583). At any time before the deposit is paid into court, the defendant may deliver to the sheriff a written direction, to pay it to a third person, therein specified, in the event that the defendant becomes entitled to a return thereof, but without expressing any other contingency. The direction must be acknowledged or proved and certified, in like manner as a deed to be recorded; and the sheriff

must deliver it to the officer who receives the deposit, who must note the substance thereof, with the entries of the deposits, in his books, and upon the two certificates of payment into court. The money thus deposited is deemed the property of the third person, subject to the plaintiff's interest therein; and subject to the rights of a creditor of the defendant, where the direction was given for the purpose of hindering, delaying, or defrauding creditors. The money, or the residue thereof, must be paid to the third person, where, by the provisions of sections five hundred and eighty-four and five hundred and eighty-five of the code of civil procedure, it is required to be refunded to the defendant, or his representative. (Co. Civ. Proc. § 586). If money deposited is not refunded, as prescribed in section five hundred and eighty-four of the code of civil procedure, it is, in a case where the order of arrest could be granted only by the court, subject to the direction of the court, as justice requires, before and after the judgment. In any other case if it remains on deposit, when final judgment is rendered for the plaintiff, it must be applied under the direction of the court, in satisfaction of the judgment; and the surplus, if any, must be refunded to the defendant, or his representative. If the final judgment is for the defendant, or the action abates, or is discontinued, the sum deposited, and remaining unapplied, must be refunded to the defendant or his representative. (Co. Civ. Proc. § 585). Money paid into the court is at the risk of the depositor, and if it should be lost, stolen, or embezzled, without any act of the plaintiff contributing thereto, it is the depositor's loss. (*Parsons v. Travis*, 5 Duer, 650). If money is deposited, as prescribed in sections five hundred and eighty-two and five hundred and eighty-three of the code of civil procedure, bail may be given, and may justify upon notice, at any time before the expiration of the right to be discharged on bail. Thereupon the judge, before whom the justification is had, must direct in the order of allowance, that the money deposited be refunded to the defendant or his representa-

tive, and it must be refunded accordingly. (Co. Civ. Proc. § 584).

Sec. 4. Liability of Sheriff.

If, after the defendant is arrested, he escapes or is rescued, or the bail, if any, given by him, do not justify, when they are not accepted, or if the sheriff fail to pay the deposit into **court** as required by section five hundred and eighty-three of the code of civil procedure, the sheriff is liable as bail. But the sheriff may, except in an action to recover a chattel, discharge himself from liability, by the giving and justification of bail, as follows:

1. If the case is one where the order could be granted only by the court, at any time before the court directs the performance of the act specified in the order.

2. In any other case, at any time before an execution is issued against the person of the defendant, upon a judgment in the action. (Co. Civ. Proc. § 587).

The sheriff is not liable for an escape, where the process is void. (*Carpenter v. Willett*, 31 N. Y. 90). After the defendant has once given bail, the sheriff has no right to restrain him. It is only the failure of bail to justify, that makes the sheriff liable as bail, with the right to arrest his principal and detain him. (*Arteaga v. Conner*, 88 N. Y. 403). If the defendant escapes before bail is given, or if the sheriff permits the defendant to go at large, without giving bail, or making a deposit, he becomes liable as bail himself. (*Bensel v. Lynch*, 44 N. Y. 162). The sheriff may as bail re-arrest the defendant without process. (*Sartos v. Merceques*, 9 How. Pr. 188). He is entitled to discharge his liability as bail, in the same manner as other bail, by surrendering the prisoner to custody. (*Bradly v. Brundage*, 59 N. Y. 310). For a refusal to arrest defendant, under a valid process, plaintiff has an action against the sheriff as bail, or an action for the omission of his official duty, and may recover such damages as he has sustained, and the damages are determined by the amount of the judgment against the prisoner. (*Cosgrove v. Boyce*, 4 Law. Bull. 7). If the sheriff discharges

the defendant, pursuant to the direction of the special term contained in an order vacating the order of arrest, the reversal of the *vacatur* will not render him liable. (*Perry v. Kent*, 88 Hun, 407; *affd.* on opinion below, 157 N. Y. 710). If judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned wholly or partly unsatisfied, the official bond of the sheriff may be prosecuted, as in any other case of delinquency. (Co. Civ. Proc. § 588). The sureties on the sheriff's official bond are liable, for any default of the sheriff as bail, incurred by him under the section last cited. (*People v. Dikeman*, 4 Keyes, 93). Within ten days after the defendant is arrested, if he does not give bail, or if he gives bail, within ten days after the justification of the bail, the sheriff must file with the clerk the order of arrest, or, where it was granted by the court, the certified copy thereof, delivered to him, with his return thereupon indorsed, the papers upon which the order of arrest was granted, and the undertaking given on the part of the plaintiff. Where an order of arrest, directing the arrest of two or more defendants, has been executed as to one or more, but not as to all of them, the sheriff may file a copy of the order of arrest instead of the original. (Co. Civ. Proc. § 590). Failure to file the undertaking, pursuant to this section is a mere irregularity, and the court has the power to permit it to be done *nunc pro tunc*. (*Dieckerhoff v. Ahlborn*, 2 Abb. N. C. 372).

ARTICLE VI.

CHARGING AND DISCHARGING BAIL.

SECTION.

1. When and how defendant surrendered.
2. Rights and liabilities of bail.
3. Defenses in action against bail.

Sec. 1. When and how Defendant Surrendered.

Except in an action to recover a chattel, the bail may surrender the defendant in their own exoneration, or the defendant may surrender himself, in exoneration

of the bail, before the expiration of the time to answer, in an action against them. The surrender must be made to the sheriff of the county where the defendant was arrested. (Co. Civ. Proc. § 591). Bail have a right to surrender defendant before they have justified, and such surrender may be made by any one of the bail. (*Matter of Taylor*, 7 How. Pr. 212). Where the bail has received an undertaking in his favor from the wife of a party, he will not be released on his application for leave to surrender his principal, unless it is affirmatively shown that the wife is irresponsible. (*Mills v. Hildreth*, 7 Hun, 298; S. C. 81 N. Y. 91). The defendant, after being surrendered by his bail, is entitled to be discharged, upon tendering a new bond, similar in form to the one first given. (*McCallum v. Barnard*, 58 How. Pr. 169). After the bail has become charged, it is too late to apply for an exoneration of the bail. (*McKenzie v. Smith*, 48 N. Y. 143).

Where the bail surrender the defendant, the surrender must be made in the following manner:

1. They must take the defendant to the sheriff, and require him, in writing, to take the defendant into his custody.

2. A certified copy of the undertaking of the bail must be delivered to the sheriff, who must detain the defendant in his custody thereupon, as upon the original mandate, and must, by a certificate in writing, acknowledge the surrender. Upon the application of the bail, made upon notice to the plaintiff's attorney, and upon production of the sheriff's certificate and a copy of the undertaking, a judge of the court, or the county judge of the county where the action is triable, may make an order directing that the bail be exonerated. On filing the order and the papers used on the application therefor, the bail are exonerated accordingly. (Co. Civ. Proc. § 592). For the purpose of surrendering the defendant, the bail, at any place or at any time before they are finally charged, may themselves arrest him, or by a written authority, endorsed on a certified copy of the undertaking, may empower another person to do so, and one or more of the bail may

thus arrest and surrender the defendant, although the others do not join with him or them for that purpose. (Co. Civ. Proc. § 593). Where the defendant surrenders himself in exoneration of his bail, he must present himself to the sheriff, and require the sheriff, in writing, to take him into custody, in exoneration of his bail. The sheriff must detain him accordingly, as prescribed in subdivision two, of section five hundred and ninety-two of the code of civil procedure, and, if requested by the bail, at any time after the surrender, the sheriff must, by a certificate in writing, acknowledge the surrender. An order for the exoneration of the bail may be procured, as prescribed in section five hundred and ninety-two. (Co. Civ. Proc. § 594).

Sec. 2. Rights and Liabilities of Bail.

Where the sheriff is liable as bail, he has all the rights and privileges, and is subject to all the duties and liabilities of bail; and bail given by him, in order to discharge himself from liability, must be regarded as the bail of the defendant in the action. But this section does not apply to an action to recover a chattel; or to a case where a defense arises to an action against the bail, in consequence of an act or omission of the sheriff. (Co. Civ. Proc. § 595). The rights of the sheriff, under this section, are the same as those of other bail, and he may make the same defenses in an action against himself, as may be made in an action against bail by section five hundred and ninety-nine of the code. (*Douglas v. Haberstro*, 88 N. Y. 611). The bail, taken upon the arrest, unless they justify, or other bail are given, are liable to the sheriff for all damages, which he sustains by reason of the omission. (Co. Civ. Proc. § 589). After the sheriff has become liable as bail, because the sureties have failed to justify, their liability is no longer that of bail, but as indemnitors to the sheriff for damages he may sustain in consequence of the relation of bail, thrust upon him. (*Haberstro v. Bedford*, 43 Hun, 201; 118 N. Y. 187). The sheriff has no right of action, under this section, until he has sustained damages by reason of the liability

as bail, which the law imposes upon him, as a consequence of a failure to justify or to put in other bail. The action is not upon the undertaking, but for damages sustained by the sheriff as bail. (*Clapp v. Schutt*, 44 N. Y. 104). A judgment in an action against the sheriff for an escape, establishes conclusively that the judgment debtor has escaped, and is evidence of the damage sustained by the sheriff, in the same manner as though the judgment had been collected. (*Toll v. Alvord*, 64 Barb. 568).

In case of a failure to comply with the undertaking, the bail may be proceeded against by action, and not otherwise. (Co. Civ. Proc. § 596). Such an action may be brought, in a case where the order of arrest could be granted only by the court, at any time after the bail have failed to comply with their undertaking. Where the undertaking was given in an action to recover a chattel, an action may be brought thereupon, at any time after the return, wholly or partly unsatisfied, of an execution for the delivery of the possession of the chattel, with respect to which the order of arrest was granted. In any other case, the action cannot be brought, until the following requisites have been complied with:

1. An execution against the property of the defendant must have been issued to the sheriff of the county in which he was arrested, and returned by that sheriff, wholly or partly unsatisfied.

2. An execution, against the person of the defendant, must have been issued to the same sheriff, and by him returned, not less than fifteen days after its receipt, to the effect that the defendant could not be found within his county. (Co. Civ. Proc. § 597). The complaint in such action must allege a recovery of a judgment, in the action in which the undertaking was given; and (except in an action where the order could be granted only by the court) the further allegations of the issue and return of the executions, wholly or partly unsatisfied. (*Moses v. Waterbury Button Co.*, 37 N. Y. Super. 393). The return, by a sheriff, to an execution against the person, of "not found" subjects the

bail of the defendant to an action, and is conclusive upon him. If the return be false, the bail has a right of action against the sheriff, for damage sustained by reason thereof. (*Cosine v. Walter*, 55 N. Y. 304). The cause of action is assignable, and the assignee may maintain the action in his own name. (*Moses v. Waterbury Button Co.*, *supra*). Though one of two defendants has been imprisoned under execution, if the other is "not found," the plaintiff may proceed against the bail of the one not found; the imprisonment of one is no satisfaction as to the other. (*Crouse v. Paddock*, 8 Hun, 630).

The sheriff must diligently endeavor to enforce an execution issued and delivered to him, as prescribed in section five hundred and ninety-seven of the code of civil procedure, notwithstanding any direction he may receive from the plaintiff or his attorney. (Co. Civ. Proc. § 598).

Sec. 3. Defenses in Action Against Bail.

In an action against bail, it is a defense, that an execution against the property, or against the person of the defendant in the original action, was not issued, as prescribed in section five hundred and ninety-seven of the code of civil procedure; or that it was not issued in sufficient time to enable the sheriff to enforce it; or that a direction was given, or other fraudulent or collusive means were used, by the plaintiff or his attorney, to prevent the service thereof. (Co. Civ. Proc. § 599). The undertaking on the part of the bail, imports the liability of the defendant, and the sureties are estopped from controverting it. (*Gregory v. Levy*, 12 Barb. 610). They cannot defend on the ground of irregularity of the judgment; they should apply to set aside the judgment, and be allowed to defend. (*Jewett v. Crane*, 35 Barb. 208). In the absence of fraud, the sureties cannot avoid the effect of the bond, on the ground that they were induced to sign it by a mistake as to its contents. (*Wheaton v. Fay*, 62 N. Y. 275).

If the defendant in the original action, after his discharge from bail, is imprisoned, either within or

without the state, upon a criminal charge, or a conviction of a criminal offense, the court, in which an action against the bail is pending, may before the expiration of the time to answer, and upon notice to the adverse party, make such an order for the relief of the bail as justice requires. (Co. Civ. Proc. § 600). Except in an action to recover a chattel, the bail must be exonerated where either of the following events occurs, before the expiration of the time to answer in an action against them:

1. The death of the original defendant.
2. His legal discharge from the obligation to render himself amenable to the process, direction, or proceedings, with respect to which the undertaking of the bail was made.
3. His surrender to the sheriff of the county where he was arrested, as prescribed in section five hundred and ninety-one of the code of civil procedure and the following sections.

Where either event occurs, after the commencement of the action against the bail, the court may, in its discretion, impose the payment of the plaintiff's costs and expenses, incurred after the return of the execution against the person, as a condition of allowing the exoneration. And the court may by an order, made upon notice to the adverse party, grant such further time as it deems just, after answer, for the surrender of the original defendant. In that case, his surrender, within the time so granted has the same effect, as if it had been made before answer. (Co. Civ. Proc. § 601). A motion by bail is the proper course, if they desire to be exonerated, and on such motion whatever question arises on the judgment, or proceedings in the action, touching the liability of the bail must be discussed and decided. (*Obregon v. DeMier*, 54 How. Pr. 390). On the death of the principal, bail will be exonerated on motion. (*Merritt v. Thompson*, 1 Hilt. 550). The bail may be permitted to defend the original action, for their own protection. (*Jewett v. Crane*, 35 Barb. 208). If bail pay the amount of the judgment while an appeal is pending, it does not discharge their liability as bail.

(*Appleby v. Robinson*, 44 Barb. 316). On an application for further time to surrender the defendant, it is necessary to show that the bail are not indemnified. (*Bank of Geneva v. Reynolds*, 12 Abb. Pr. 81). In the case last cited, the application was granted on payment of the costs of the action commenced against them, where it appeared that the principal was absent from the state. If the sheriff applies to surrender the defendant, after the time to answer has expired, in a case against himself, he must show a substantial and sufficient excuse for permitting defendant to be at large. (*Douglass v. Haberstro*, 21 Hun, 320). Sickness of principal, or bail, would be a good reason for enlarging the time. (*Baker v. Curtis*, 10 Abb. Pr. 279). Impossibility to procure a copy of the undertaking of bail, was held sufficient to warrant an extension. (*Van Rensselaer v. Hopkins*, C. & C. Cas. 481).

Title I of chapter VII of the code of civil procedure excepting section five hundred and forty-eight thereof, applies only to an action in the supreme court, the city court of the city of New York, or a county court. (Co. Civ. Proc. § 3347).

CHAPTER XV.

INJUNCTIONS.

- ARTICLE I.....Definition and nature.
ARTICLE II.....When injunction will be granted.
ARTICLE III.....Proceedings to obtain the order.
ARTICLE IV.....The order.
ARTICLE V.....Security.
ARTICLE VI.....Damages sustained by the injunction.
ARTICLE VII...Vacating or modifying the order.
ARTICLE VIII..Effect of subsequent proceedings in the action.

ARTICLE I.

DEFINITION AND NATURE.

SECTION.

1. Definition.
2. Nature and object of the remedy.

Sec. 1. Definition.

An injunction is a judicial process, operating *in personam* whereby a party is required to do, or to refrain from doing, a particular thing, according to the exigency of the writ. It is restrictive, as well as preventive, and it may be used both in the enforcement of rights, and in the prevention of wrongs.

In the former chancery practice, the injunction was always granted by writ; but since the code, the writ of injunction has been abolished, and a temporary injunction may be granted by order. (Co. Civ. Proc. § 602). An injunction thus granted is a mandate of the court. (Co. Civ. Proc. § 3343, subd. 2). With reference to their duration, injunctions are divided into final or perpetual, and preliminary or interlocutory, or, as they are styled in the code of civil procedure, temporary injunctions. Perpetual injunctions are granted

only by the final judgment. (*Jackson v. Bunnell*, 113 N. Y. 216; *Burnham v. Acton*, 7 Robt. 395; 1 Barb. Ch. Pr. 614). The distinction between a perpetual and temporary injunction is that the first is a matter of strict right, depending upon the rules of equity (*Linden v. Hepburn*, 3 Sand. 668); while the other is a matter of discretion, and is controlled largely by considerations of convenience and necessity. The code has not affected the power of the court to grant injunctions. (*N. Y. Life Ins. Co. v. Supervisors of N. Y.*, 4 Duer, 192; *Neustadt v. Joel*, 2 Duer, 530; 13 N. Y. 488). The rules of the code, which will be discussed in this chapter, apply only to injunctions which are granted before final judgment, and which are called in that work, temporary injunctions. Injunctions are also known as mandatory and preventive, according as they command the defendant to do, or to refrain from doing a particular thing. It is not usual to award a mandatory injunction, until final judgment in a case. But the court may, by process mandatory in effect, do what is necessary to prevent a defendant from defeating the rights of other parties, during the pendency of the action. (*Hanover Fire Ins. Co. v. Germania Fire Ins. Co.*, 33 Hun, 539).

Sec. 2. Nature and Object of the Remedy.

In general, injunctions are used rather to prevent future injury, than to afford redress for wrongs already committed; and it is therefore to be regarded more as a preventive than as a remedial process. (*High on Injunctions*, § 1). The principal object of a temporary injunction is the preservation of the subject in controversy in its then condition, and, without finally determining any questions of right, to prevent the further perpetuation of wrong, or the doing of any act, whereby the right in controversy may be materially injured or endangered. (*High on Injunctions*, § 4; *Van Veghten v. Howland*, 12 Abb. Pr. N. S. 461). The leading principle on which courts proceed in dealing with applications for temporary injunctions, is that only such restraint shall be imposed as may suffice to stop the mischief complained of, where it is; to stay a

further injury, and to keep things where they are for the present. (*Blakemore v. Glamorganshire, etc. Co.* 1 Myl. & K. 154). In granting relief by temporary injunctions, courts of equity in no manner anticipate the ultimate determination of the questions of right involved; they merely recognize that a sufficient case has been made out to warrant the preservation of the property, or rights in issue, *in statu quo*, until a hearing upon the merits; without expressing, and indeed without having the means of forming an opinion as to such rights. (High on Injunctions, § 5).

ARTICLE II.

WHEN INJUNCTION WILL BE GRANTED.

SECTION.

1. General principles.
2. When right depends upon nature of the action.
3. When right depends upon extrinsic facts.
4. Various cases in which it will be granted.

Sec. 1. General Principles.

While the code has not affected the power of the court to grant temporary injunctions, it has enlarged the classes of cases in which they may be allowed. (*Neustadt v. Joel*, 2 Duer, 530; 13 N. Y. 488; *Merritt v. Thompson*, 3 E. D. Smith, 283). Temporary injunctions can only be granted in cases prescribed in the code. (*Fellows v. Heermans*, 13 Abb. Pr. N. S. 1). When a temporary injunction is incidental to the relief sought, and not the principal thing demanded, the granting of it is discretionary with the court of original jurisdiction. (*People v. Schoonmaker*, 50 N. Y. 499; *Pfohl v. Sampson*, 59 N. Y. 174). No rule can be prescribed which will absolutely control every case. (*Ludvigh v. Dusseldorf*, 8 Wk. Dig. 490). The fact that the refusal of the injunction would defeat the object for which the action is brought, is not, of itself, sufficient to deprive the court of discretion whether or not to grant it. (*Young v. Campbell*, 75 N. Y. 525). Though it is usually discretionary with the court whether or

not to grant a temporary injunction, yet where the complaint prays an injunction as part of the relief, the granting of it is error of law, reviewable in the court of appeals, if the complaint does not show that the plaintiff is entitled to the relief demanded. (*McHenry v. Jewett*, 90 N. Y. 58). In no other circumstances, however, is the discretion reviewable by the court of appeals. (*Castoriano v. Dupe*, 145 N. Y. 250). A temporary injunction can only be granted in an action, and not in a proceeding commenced by petition. (*Matter of S. I. Elec. R. R. Co. v. King*, 21 App. Div. 188; *Manneck Mfg. Co. v. Manneck*, 3 Law Bull. 26; 23 Alb. Law. J. 216). To warrant a temporary injunction the plaintiff's rights should be reasonably clear, upon the law and the facts (*Noonan v. Grace*, 49 Super. 116; *Electrical Power Storage Co. v. Whiting*, 17 Wk. Dig. 263); but a probable and *prima facie* case is sufficient. (*McHenry v. Jewett*, 90 N. Y. 58, 63). But there are qualifications to this rule; where the respective rights of the parties are doubtful, and the continuance of the acts complained of will work permanent and substantial damages to the plaintiff, and the injury resulting to the defendant from a temporary injunction, can cause no loss that cannot be fully compensated, and for that compensation he can have security, the court may, in its discretion, grant a temporary injunction, pending the litigation, and until the rights of the parties are definitely established in the case. (*Rector of the Church of Holy Innocents v. Keech*, 5 Bosw. 691; *Spear v. Cutter*, 5 Barb. 486). It should always appear that the injunction is necessary to protect the plaintiff's rights during the litigation. (*Bagaley v. Vanderbilt*, 16 Abb. N. C. 359; *McHugh v. B. H. & E. R. R. Co.*, 66 Barb. 612). It must also appear that the act complained of is illegal as to the plaintiff, and it must be a violation of his private rights. The mere fact that the act is in violation of law, or even that it is criminal, will not warrant the injunction. (*Anderson v. Doty*, 33 Hun, 160). The injury complained of must be without adequate redress in any other way. (*Savage v. Allen*, 54 N. Y. 458; *Johnston Harvester Co. v. Meinhardt*, 9 Abb. N. C. 393;

24 Hun, 489). It must be irreparable, that is, not susceptible of being adequately compensated in damages; or such as from its continuance, must occasion a constantly occurring grievance, or permanent mischief, which cannot be otherwise prevented, as where loss of health, loss of trade or business, destruction of the means of subsistence, or permanent wrong to property, may or will ensue from the wrongful acts, or where an easement or servitude is annexed by grant, covenant or otherwise to a private estate. (Hilliard on Injunctions, § 31).

The incompleteness and inadequacy of the legal remedy is the criterion of the right to an injunction. (3 Pomeroy's Eq. Juris. § 1338). This rule does not, however, apply to the cases which are solely cognizable in equity. In such cases the question whether the remedy at law is adequate, cannot arise, for there is no remedy at law. (3 Pomeroy's Eq. Juris. § 1339). Usually, however, if a plaintiff has an adequate remedy by damages, or by instituting criminal proceedings, or by appeal or mandamus, or filing a notice of *lis pendens*, an injunction will be refused. (*Savage v. Allen*, 54 N. Y. 458; *Fincke v. Police Commr's*, 66 How. Pr. 318; *People v. Coffin*, 7 Hun, 608; *People v. Wasson*, 64 N. Y. 167; *Gregory v. Gregory*, 33 Super. 1). The fact that a *lis pendens* has been filed in the action, is not necessarily an objection to granting an injunction, if it is doubtful whether the *lis pendens* will protect the interest of the plaintiff. (*Cornell v. King*, 13 Wk. Dig. 327). If the plaintiff is guilty of laches in moving to protect his rights, the temporary injunction will be refused. (*Van Ranst v. N. Y. College of Vet. Surgeons*, 4 Hun, 620). It will also be refused, where the plaintiff stands by and permits the defendant to incur large expense without objection. (*Ninth Ave. R. R. Co. v. N. Y. Elevated R. R. Co.*, 3 Abb. N. C. 347). But relief will not be refused for laches, if the plaintiff could not, at first, ascertain the extent of the injury, and if he moved promptly when he fully discovers the facts. (*Mattlage v. N. Y. Elevated R. R. Co.*, 14 Daly, 1; S. C. 67 How. Pr. 232). A temporary injunction will not

be granted, simply because the plaintiff will probably recover in the action (*Troy & Boston R. R. Co. v. B. H. T. & W. R. R. Co.*, 13 Hun, 60), unless it is probable that without it, the court cannot on final judgment do justice between the parties. (*Van Veghten v. Howland*, 12 Abb. Pr. N. S. 461). Before granting a temporary injunction, the court will consider not only the nature and extent of the injury to the plaintiff, but also the consequences to the defendant if it should be granted. (*Bruce v. D. & H. Canal Co.*, 19 Barb. 371; *Power v. Village of Athens*, 19 Hun, 165). It will be refused where it will create a greater wrong to the defendant to grant it, than to the plaintiff to refuse it. (*Gallatin v. Oriental Bank*, 16 How. Pr. 253; *Brower v. Williams*, 44 App. Div. 337). A temporary injunction never will be granted, where it appears inequitable, or contrary to the real justice of the case. (*Troy & Boston R. R. Co. v. B. H. T. & W. R. R. Co.*, 86 N. Y. 107). The fact that no case precisely in point can be found in the books, is not a sufficient reason for refusing an injunction. (*Niagara Falls Int. Bridge Co. v. Gr't Western R. R. Co.*, 39 Barb. 212, 223). A temporary injunction cannot be granted on the submission of a controversy without action (Co. Civ. Proc. § 1281); although the question submitted is whether or not the plaintiff is entitled to an injunction. (*Cunard S. S. Co. v. Voorhis*, 104 N. Y. 525).

Sec. 2. When Right Depends Upon Nature of the Action.

Where it appears, from the complaint, that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to the plaintiff, an injunction order may be granted to restrain it. The case, provided for in this section, is described in the code of civil procedure as a case where the right to an injunction depends upon the nature of the action. (Co. Civ. Proc. § 603). This section applies only to suits in equity. (*Reubens v. Joel*, 13 N. Y. 488). In a judgment creditor's action, a temporary

injunction, restraining the transfer to any person, or the payment or delivery, to the judgment debtor, of any money, thing in action or other property or interest, which might be applied to the satisfaction of the sum due to the plaintiff, is deemed to be one of those specified in section six hundred and three. (Co. Civ. Proc. § 1876). A temporary injunction granted in an action by the people, against the usurper of an office or franchise, pursuant to section nineteen hundred and forty-eight of the code of civil procedure, is also deemed one of those prescribed in section six hundred and three. (Co. Civ. Proc. § 1955). An injunction under this section can only be granted on the complaint. (*Sanders v. Ader*, 26 App. Div. 176). It must show a cause of action entitling the plaintiff to relief in equity (*McHenry v. Jewett*, 90 N. Y. 58); it is not sufficient where it appears that the final relief sought is contingent upon a future event. (*Victor v. Lewis*, 38 App. Div. 316). The *allegations* in the complaint cannot be helped out by affidavits. (*Hentz v. Long Island R. R. Co.*, 13 Barb. 646; *Stull v. Westfall*, 25 Hun, 1); affidavits may be used, however, to furnish *evidence* of the allegations made in the complaint. (*Id.*; *Bagg v. Robinson*, 12 Misc. 299, 303), and it would seem the better practice to use affidavits in addition to the complaint in order to satisfy the court that "sufficient grounds exist" for the injunction, within the meaning of section 607 of the code of civil procedure. Where an injunction is sought under this section, it must be prayed for as a part of the relief demanded in the complaint. (*Olssen v. Smith*, 7 How. Pr. 481; *Walker v. Deveraux*, 4 Paige, 229; *Sanders v. Ader*, *supra*). A temporary injunction cannot be granted to restrain the doing of acts in relation to property, in respect to which no final judgment is asked. (*Hulce v. Thompson*, 8 How. Pr. 475). If the only relief demanded is an injunction, it must appear from the complaint, that the plaintiff is entitled to it under the rules of equitable jurisprudence. (*Troy & Boston R. R. Co. v. B. H. T. & W. R. R. Co.*, 86 N. Y. 107; *McHenry v. Jewett*, 90 N. Y. 58). Where a temporary injunction is of the same nature as

that sought by the final judgment, it should not be granted, unless some immediate and irreparable injury is probable which cannot be remedied by a final judgment (*Bronk v. Riley*, 50 Hun, 489; *McGuire v. Bloomington*, 8 Misc. 478); and the complaint must state facts and circumstances, from which the court can see that such injury is probable. A mere allegation that such injury was apprehended or threatened, is not enough. (*McHenry v. Jewett*, 90 N. Y. 58).

Sec. 3. Where Right Depends Upon Extrinsic Facts.

In either of the following cases, an injunction order may also be granted in an action:

1. Where it appears, by affidavit, that the defendant, during the pendency of the action, is doing, or procuring, or suffering to be done, or threatens, or is about to do, or to procure, or suffer to be done, an act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction order may be granted to restrain him therefrom.

2. Where it appears by affidavit, that the defendant, during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with an intent to defraud the plaintiff, an injunction order may be granted, to restrain the removal or disposition. (Co. Civ. Proc. § 604).

The term, "subject of the action," means the things, money, lands, chattels, or the like, in relation to which the suit is prosecuted, or the right which is sought to be enforced. (Pomeroy on Remedies, § 475; *Glenn & Hall Mfg. Co. v. Hall*, 61 N. Y. 226, 233). In an action on a money judgment, therefore, an injunction cannot be issued restraining the defendant from fraudulently disposing of certain property; the "subject of the action" is the judgment, not the defendant's property. (*Campbell v. Ernest*, 64 Hun, 188). A temporary injunction, under this section, may be granted on affidavits, before service of the complaint (*Continental Store Service Co. v. Clark*, 7 Civ. Proc. Rep. 183; *affd.* 100 N. Y. 365); it may, also, be granted before the serv-

ice of the summons. (*People ex rel Cauffman v. Van Buren*, 136 N. Y. 252). Where an injunction is sought under subdivision two of this section, it may be granted at the suit of any creditor, although he has not recovered a judgment. (*Mitchell v. Bettman*, 25 Barb. 408). It is granted in such cases, however, only to prevent an intended fraudulent disposal of property, and not where the removal or transfer has been completed. (*Reubens v. Joel*, 13 N. Y. 488). Such an injunction will not be granted to restrain all removal or disposition of property; but only a removal with intent to defraud the plaintiff. (*Brewster v. Hodges*, 1 Duer, 609). A threat by the defendant to make a general assignment, and prefer other creditors to the plaintiff, will not warrant the granting of an injunction under this subdivision. (*Pomeroy v. Hindmarsh*, 5 How. Pr. 437). It will never be issued, to prevent the disposition of property, not within the jurisdiction of the court. (*Rogers v. M. S. & N. I. R. R. Co.*, 28 Barb. 539). Where one purchased goods on credit, and assigned to another, to defraud the seller, and both are insolvent, an injunction, pending an action for the price, was allowed under this subdivision. (*Malcolm v. Miller*, 6 How. Pr. 456). In an action for a separation, where the husband had disposed of his property, and was about to remove from the state, without providing for the plaintiff, a temporary injunction was granted. (*Vermilyea v. Vermilyea*, 14 How. Pr. 470). The disposal of ordinary commercial property will not be enjoined, where the responsibility of the defendant is undoubted. (*Power v. Alger*, 13 Abb. Pr. 284, 475).

Sec. 4. Various Cases in Which it Will Be Granted.

It is not intended to go into a comprehensive examination, with reference to the various purposes, to which an injunction may be applied. To do this, would require not a chapter, but a complete treatise. It may be useful, however, to call attention to a few of the particular cases in which injunctions have been granted; not exhaustively, but merely by way of illustration of the general subject.

Subdivision 1.—CONTRACTS.

Usually, a temporary injunction will not be granted to restrain violations of a contract, but this rule will not be applied, where an injury cannot be fully compensated for in damages. Thus, a violation of a contract not to carry on business in a particular locality, has been restrained, although the agreement provides for liquidated damages for its violation. (*Diamond Match Co. v. Roeber*, 106 N. Y. 473). One who has made such a contract, will be restrained from carrying on the business, as the subordinate of another. (*Engel v. Kuche*, 3 Law Bull. 34). An injunction will not be issued, to restrain a violation of an agreement not to do any act to the injury, or to the prejudice of the plaintiff. (*Stull v. Westfall*, 25 Hun, 1). Where a railroad company, in consideration of the conveyance of the right of way, had agreed that all passenger trains should stop at the plaintiff's place, an injunction was granted to forbid their running any trains which did not stop. (*Lawrence v. Saratoga Lake R. R. Co.*, 36 Hun, 467). One who obtains quotations of sales and market prices, under a contract not to disclose them, will be restrained from doing it. (*Gold & Stock Tel. Co. v. Todd*, 17 Hun, 548). The disclosure of the secrets of an art will be restrained, when it has been taught under a promise not to divulge it. (*Tabor v. Hoffman*, 41 Hun, 5; *Roosen v. Carlson*, 46 App. Div. 233). But if the plaintiff's claim arises from an illegal contract, its violation will not be prevented by injunction. (*Bennett v. American Art Union*, 5 Sand. 614).

Subdivision 2.—COPYRIGHT.

Before publication, an author has by common law, the exclusive title to his property, and the right to determine whether it shall be published at all, and if published, when, where, by whom, and in what form. (*Palmer v. DeWitt*, 47 N. Y. 532). The publication by another will be restrained, although it is a play, which the author has represented upon the stage. (*Id.*). The assignee of an author may have an injunction, to re-

strain the publication of a manuscript, or the production of a play. (*Shook v. Daly*, 49 How. Pr. 366; *Widmer v. Greene*, 56 How. Pr. 91). Where an artist has painted a picture, and assigned to another the exclusive right to reproduce copies, the assignee may have an injunction to restrain third parties from printing and selling copies of it. (*Oertel v. Wood*, 40 How. Pr. 10). But after the publication, the author's right to multiply copies is dependent upon the copyright statute of the United States; and it cannot be protected by injunction, in the courts of the state (*Potter v. McPherson*, 21 Hun, 559; *Jewellers' Merc. Agency v. Jewellers' Weekly Pub. Co.*, 155 N. Y. 241), except as against some one who, by contract or otherwise, is estopped to deny the author's right. (*Saltus v. Belford Co.*, 133 N. Y. 499). The right of the author to the exclusive publication of an immoral play, or work, will not be protected. (*Shook v. Daly*, 49 How. Pr. 366).

Subdivision 3.—CORPORATIONS.

(A.) *In General.* Corporations may be restrained by injunction, in the same manner, and to the same extent, as individuals. (*Mayor, etc. v. N. Y. & Staten Island Ferry Co.*, 64 N. Y. 622). An injunction will issue to restrain a corporation, from completing an unlawful sale of all the property of the company. (*Abbott v. Am. Hard Rubber Co.*, 33 Barb. 578; *Treadwell v. United Verde Copper Co.*, 47 App. Div. 613). A corporation will be restrained from the payment of an unearned dividend (*Carpenter v. N. Y. & N. Haven R. Co.*, 5 Abb. Pr. 277); but if a dividend has been earned, it will not be restrained by injunction from paying it in cash, or in stock. (*Williams v. Western Union Tel. Co.*, 93 N. Y. 162). The directors of a corporation may be restrained from committing fraudulent acts, which they are charged to intend, or any particular wrong, affecting the private rights of the stockholders (*Bedford v. Am. Aluminum Co.*, 51 App. Div. 537); but they will not be restrained from performing the general and ordinary business of the corporation.

(*Howe v. Deuel*, 43 Barb. 504). One corporation may, by injunction, be restrained from consolidating with another. (*Blatchford v. Ross*, 54 Barb. 42). A corporation will be restrained from issuing bonds, as a part of a fraudulent design to increase stock, or from converting into stock, bonds so issued, and held by persons with notice. (*Belmont v. Erie Railway Co.*, 52 Barb. 637). A corporation, engaged in supplying commercial intelligence, will be restrained from removing its instruments from the office of the plaintiff, for the reason that they are bound impartially to serve all who pay them. (*Smith v. Gold & Stock Tel. Co.*, 42 Hun, 454). An injunction, suspending the general and ordinary business of the corporation, can only be granted by the court, upon notice. (Co. Civ. Proc. § 1809). Such an injunction will not be granted, unless there is a plain violation of law, or a departure from the powers of the corporation. (*Bach v. Pacific Mail S. S. Co.*, 12 Abb. Pr. N. S. 373). An injunction, which forbids a railroad company, from leasing or selling any part of the property of the company, or restrains it from making a particular contract for building or equipping its road, is of this nature, and cannot be granted without notice (*Town of Middletown v. R. & O. R. R. Co.*, 12 Abb. Pr. N. S. 276; 43 How. Pr. 481); but one which forbids a railroad company, from making an intersection with another company, is not within this section, and may be granted *ex parte*. (*Howlett v. N. Y. West Shore & Buffalo R. R. Co.*, 14 Abb. N. C. 328). An injunction will not be granted, to prevent an improper election, or an election of improper persons, to be directors (*Clinton Liberal Inst. v. Fletcher*, 55 How. Pr. 431); nor to prevent the initiation into a society, of persons claimed to be illegally elected, unless pecuniary injury to plaintiff is shown. (*Thompson v. The Society of Tammany*, 17 Hun, 305). *De facto* directors of a corporation will not be restrained from acting, on the sole ground of the invalidity of their title. (*People v. Conklin*, 5 Hun, 452). Nor will the validity of a corporate election be determined upon a motion for a temporary injunction. (*Seneca Nation of Indians v. John*,

27 Abb. N. C. 253). In an action by a judgment creditor, for sequestration of the property of a corporation, under section seventeen hundred and eighty-four of the code of civil procedure, a temporary injunction may be granted, restraining the corporation, and its trustees, directors, managers, and other officers from collecting or receiving any debt or demand, and from paying out, or in any way transferring, or delivering to any person any money, property, or effects of the corporation, during the pendency of the action, except by express permission of the court. Where an action is brought, to procure the dissolution of the corporation, the injunction may also restrain the corporation, and its trustees, directors, managers, and other officers from exercising any of its corporate rights, privileges, or franchises, during the pendency of the action; except by express permission of the court. (Co. Civ. Proc. § 1787). In an action brought by the attorney general, to procure a judgment vacating or annulling the act of incorporation, under section seventeen hundred and ninety-seven, of the code of civil procedure, an injunction may be issued, at any stage of the action, restraining the corporation, and any and all of its directors, trustees, and other officers from exercising any of its corporate rights, privileges, or franchises, or from exercising certain of them; or from exercising any franchise, liberty, or privilege, or transacting any business, not allowed by law. (Co. Civ. Proc. § 1802). In actions brought pursuant to articles two, three or four of title two, chapter fifteen, of the code of civil procedure, the court may, on the application of either party, at any stage of the action, before or after final judgment, and with or without security, grant an injunction order, restraining the creditors of the corporation, from bringing actions against the defendants, or any of them for the recovery of a sum of money, or from taking any further proceedings in an action theretofore commenced. (Co. Civ. Proc. § 1806). In proceedings for the voluntary dissolution of a corporation, the court may, after the appointment of a receiver, grant an injunction restraining the creditors of the corporation

from beginning any action against the corporation for the recovery of a sum of money, or from taking any further proceedings in an action therefore commenced. (Co. Civ. Proc. § 2423). This section does not apply to a foreclosure suit. (*Matter of Hamilton Park Co.*, 1 App. Div. 375). An injunction will be granted, at the suit of the receiver of an insurance company, on the application of the attorney general, to stay suits previously brought by policy holders, to recover assets of the corporation. (*Attorney General v. Guardian Mut. Ins. Co.*, 77 N. Y. 272). In special proceedings to wind up a corporation, actions against the receiver will be enjoined, if such actions will hamper the receiver, or increase the expenses of executing his trust. (*Attorney General v. N. A. Life Ins. Co.*, 6 Abb. N. C. 293).

(B.) *Religious Corporations.* Under chapter 79, of the laws of 1875, it was held that a religious corporation could enjoin a majority of its trustees from diverting the church property to another denomination. (*First Ref. Pres. Ch. v. Bowden*, 10 Abb. N. C. 1; 14 Abb. N. C. 356). Section 5 of the Religious Corporation Law retains in substance, the provisions of chapter 79, of the Laws of 1875, the latter having been expressly repealed by section 110, of the Religious Corporation Law. Trustees of a religious corporation will not be restrained, in an action by a pew owner, from making alterations in the pews (*Cooper v. First Pres. Ch.*, 32 Barb. 222); or from selling the church edifice, and moving to a new church. (*Erwin v. Hurd*, 13 Abb. N. C. 91). An injunction will not be granted, in an action brought to try the title to the office of trustee of a religious corporation. (*Hartt v. Harvey*, 32 Barb. 55). But where there is great doubt as to the legal rights of the rival claimants as trustees, the court will restrain an interference with those who are in recognized possession, until the legal right is settled at law. (*Reis v. Rohde*, 34 Hun, 161).

(C.) *Municipal Corporations.* A municipal corporation, or its officers, may be restrained from illegal, corrupt, fraudulent, or oppressive exercise of discretionary,

or legislative powers. (*People v. Sturtevant*, 9. N. Y. 263.) While equity will not ordinarily interfere with matters resting largely in the discretion of municipal authorities, yet, where a threatened action will produce irreparable injury, and consists in the disposition of public property, by devoting it, in part, at least, to the uses of a private corporation, or where an illegal grant is threatened, or any action attempted, which is fraudulent and corrupt, and an abuse of trust, such interference will be made. (*People v. Dwyer*, 90 N. Y. 402, 410). A private person can only maintain an action for that purpose, when the illegal act causes some special injury to his property rights. (*Milbau v. Sharp*, 27 N. Y. 611; *Doolittle v. Supervisors*, 18 N. Y. 155). In other cases, the action must be in the name of the people, or of the attorney general. (*People v. Mayor*, 32 Barb. 35; *Atty. Gen. v. Mayor, etc.*, 3 Duer, 119; reversed on another point, *sub nom.*, *Davis v. Mayor*, 14 N. Y. 506). An injunction will not issue to prevent the passage of an illegal ordinance (*Whitney v. Mayor, etc.*, 28 Barb. 233); unless it appears that the mere passage of it, would violate a contract right, or that it would produce irreparable private injury. (*Id.*; *Lawrence v. Mayor, etc.*, 2 Barb. 577). An injunction will not be granted to restrain the enforcement of a city ordinance, nor of an ordinance of the board of health, until its invalidity has been established in an action at law; and then further prosecution under the ordinance would be prevented by means of an injunction. (*Marvin Safe Co. v. Mayor, etc.* 38 Hun, 146; *Sickles v. New Rochelle Board of Health*, 41 Hun, 408). An injunction will not lie, by the village authorities, to restrain the violation of a penal ordinance. (*Village of Brockport v. Johnston*, 13 Abb. N. C. 468). An injunction will not lie, to restrain the execution of a plan of improvement, adopted by a municipal corporation, unless material and actual injury is the necessary or probable result. (*Morgan v. City of Binghamton*, 102 N. Y. 500). To authorize the granting of a temporary injunction, the act of the corporation must be illegal and beyond its power, and not merely inexpedient. (*Roberts v. Mayor, etc.*, 5 Abb. Pr. 41).

An injunction by a private person, against a municipal corporation, to restrain trespasses on the plaintiff's property, will lie only where the illegal act will produce irreparable injury, or will lead to a multiplicity of suits. (*Blake v. City of Brooklyn*, 26 Barb. 301). In actions brought under section nineteen hundred and twenty-five of the code of civil procedure, to obtain a judgment, preventing waste or injury to the estate, funds, or other property of a county, town, city, or incorporated village, a temporary injunction may be issued. (*Hurlburt v. Banks*, 1 Abb. N. C. 157, 172; *Ayres v. Lawrence*, 59 N. Y. 192).

Subdivision 4.—COVENANTS.

An injunction will be granted to restrain a violation by the lessee, of a covenant not to sub-let, or assign the demised premises (*Barrington Apprt. Assn. v. Watson*, 38 Hun, 545); or where a building is let for use for a specified purpose, to restrain the lessee from using it for any other purpose. (*Steward v. Winters*, 4 Sand. Ch. 587; *Dodge v. Lambert*, 2 Bosw. 570). Where the purchaser of a water-power, had covenanted that it should be used only for a paper mill, an injunction was issued to restrain him from using it as a cotton mill. (*Wells v. Chapman*, 13 Barb. 561). An injunction will also lie to restrain a grantee, who has covenanted not to erect, or permit to be erected, any building, on a certain specified part of the premises conveyed (*Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400); or to restrain the grantee, from doing any act which by a deed poll he had agreed not to do. (*Atlantic Dock Company v. Leavitt*, 54 N. Y. 35). It will restrain a violation of mutual covenants by adjoining owners, made to secure uniformity of structure or position of buildings, or to reserve lands for a certain purpose. (*Trustees of Columbia College v. Lynch*, 70 N. Y. 440). An injunction will issue in such cases, although the agreement provides for liquidated damages for violation of the covenant; unless it appears from the particular language, construed in the light of the surrounding circumstances, that it was the intention of the party to make the penalty the price of non-per-

formance, to be accepted by the covenantee in lieu thereof. But, if the primary intent was, that the covenant should be performed, the penalty is regarded merely as a security, and not as a substitute for it. (*Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400). Such an injunction, however, is in the discretion of the court; and although the contract may be a fair and just one when made, the interference of the court should be denied, if the subsequent events have made the performance by the defendant so onerous, that its enforcement would inflict great hardships upon him, and cause little or no benefit to the plaintiff. (*Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 317). It was held, by the special term of the superior court, that, where a lessee covenants not to use a building for any business, which would increase the hazard or rates of insurance, the court will, by injunction, restrain a violation of his covenant. (*Gillilan v. Norton*, 6 Robt. 546). But the contrary was held, in an earlier case, although later reported, decided by the general term of the court of common pleas. (*Agate v. Lowenbein*, 4 Daly, 62). An injunction will not be granted to restrain the breach of a condition subsequent. (*Erwin v. Hurd*, 13 Abb. N. C. 91.)

Subdivision 5.—EASEMENTS.

Where an easement or servitude is annexed, or pertains, to a private estate, either by grant, covenant, or prescription, any encroachment upon its quiet enjoyment and exercise, will be prevented by injunction. (*Seymour v. McDonald*, 4 Sand. Ch. 502; *Hills v. Miller*, 3 Paige, 254; *Trustees v. Cowen*, 4 Paige, 510). To warrant an interference in that class of cases, the easement should be certain, and capable of being clearly ascertained; and there should be a clear and palpable violation of the right. And the contract must be complete and sufficient contract, founded upon a valuable consideration, and its terms defined by satisfactory proof, accompanied by acts of part performance, unequivocally referable to the supposed agreement. (High on Injunctions, § 849; *Cronkhite v. Cronkhite*, 94 N. Y. 323).

The owner of land, abutting on the highway, may restrain such occupation of it by a railroad company, as will obstruct access of light or air to his premises. (*Glover v. Manhattan Ry. Co.*, 51 Super. 1). The court will restrain the removal of soil by an adjoining owner, if such removal will cause the subsidence of the plaintiff's land, by reason of the withdrawal of lateral support (*Farrand v. Marshall*, 21 Barb. 409); or where it will cause subsidence of the highway, to an extent that will interfere with access by the plaintiff to his premises. (*Milburn v. Fowler*, 27 Hun, 568). One who owns to the center of the street, subject only to the easement for a highway, may restrain the construction of a street railway, or a steam railway, along the highway. (*Craig v. Roch. City & Brighton R. R. Co.*, 39 N. Y. 404; *Fanning v. Osborne*, 34 Hun, 121; 102 N. Y. 441). One may restrain an electric light company, from erecting a pole for the purpose of supporting wires on the sidewalk, in front of his premises, where such pole is to be used for private as well as public purposes; unless it is clear that such a pole is necessary for public use. (*Tiffany v. U. S. Illuminating Co.*, 51 Super. 280). Plaintiff cannot restrain interference with an easement, unless he has a right to it, which is something more than a mere license. (*Knickerbocker Ice Co. v. Shultz*, 41 Hun, 458; 116 N. Y. 382; *Cronkhite v. Cronkhite*, 94 N. Y. 323). But the fact that his interest is trivial, is not a reason for refusing an injunction. (*Foster v. City of Buffalo*, 64 How. Pr. 127; *affd. on op. below*, 28 Hun, 56).

Subdivision 6.—FRANCHISES.

An interference with a franchise will be restrained, when the plaintiff is in possession of it, and his title is not in doubt. (*Livingston v. Van Ingen*, 9 Johns. 507). Unless the grant to the plaintiff is exclusive in terms, a temporary injunction will not issue to restrain others, claiming the right to exercise a similar franchise, or legal rights which interfere with it. (*Auburn & Cato Plk. Rd. Co. v. Douglas*, 9 N. Y. 444; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44). The grounds of restraining

an interference with a franchise, are the inadequacy of the remedy at law, and the necessity of avoiding multiplicity of suits. (High on Injunctions § 908). The city of New York has an exclusive right to grant a ferry franchise between it and the New Jersey shore; and one who runs a ferry between those points, without a grant, will be enjoined at the suit of the city. (*Mayor, etc., v. Longstreet*, 64 How. Pr. 30). The court has power to prohibit a municipal corporation from granting franchises. (*People v. Sturtevant*, 9 N. Y. 263).

Subdivision 7.—HIGHWAYS.

A commissioner of highways cannot, by injunction, compel a removal of, or restrain an obstruction in, a highway. (*Rozell v. Andrews*, 103 N. Y. 150). A private person cannot restrain, by injunction, an obstruction in a highway, unless he shows a substantial injury, which is special to himself. (*Ninth Ave. R. R. Co. v. N. Y. Elevated R. R. Co.*, 3 Abb. N. C. 347; 7 Daly, 174). One may restrain the placing of skids continuously across the sidewalk, where it presents obstructions to his place of business (*Callanan v. Gilman*, 107 N. Y. 360); or the use of the sidewalk to show goods, to such an extent as to deprive him of light, air and access. (*Hallock v. Scheyer*, 33 Hun, 111; *Lavery v. Hannigan*, 52 Super. 463). The court, by injunction, will forbid the keeping of a hack-stand on the highway in front of plaintiff's premises, where it causes inconvenience and annoyance, although a village ordinance allows it. (*McCaffrey v. Smith*, 41 Hun, 117). An injunction will issue to restrain the removal of the plaintiff's fences, and the replacing them, so as to throw open his land as a highway, and to increase the difficulty of access to his premises. (*DeWitt v. Van Schoyk*, 110 N. Y. 7). The shutting up of a highway, which is one of several approaches to the plaintiff's premises, although the most convenient, if allowed by the proper authority, will not be restrained. (*Hier v. N. Y. West Shore & Buffalo R. R. Co.*, 40 Hun, 310; *affd. on op. below*, 109 N. Y. 659). After proceedings have been taken to lay out a highway,

and the appraisal of damages has been confirmed, the commissioners of highways will be restrained from taking out of the land, to grade other portions of the highway, more gravel than the process of construction or repair requires and necessarily compels to be removed, where he takes it by digging pits in the highway. (*Robert v. Sadler*, 104 N. Y. 229). Other matters in regard to highways may be found under the head of easements and nuisances.

Subdivision 8.—JUDICIAL PROCEEDINGS.

This section refers only to the cases in which proceedings may be stayed; and it will not treat of the requirements as to security, which will be considered later.

(A.) *Actions at Law*. The jurisdiction of the courts to restrain proceedings at law, in cases where the exercise of this jurisdiction is essential to the complete administration of justice, and the proper security of the rights of litigants, is well established, and has not been abrogated or prejudiced by the union of the two jurisdictions of law and equity, in a single tribunal. (*Fielding v. Lucas*, 87 N. Y. 197, 199; *Bomeisler v. Forster*, 154 N. Y. 229). One judge of the supreme court, sitting at special term, has authority to enjoin the prosecution of an action, before another judge, or in another court (*Erie Railway Co. v. Ramsey*, 45 N. Y. 637; *N. Y. & New Haven R. R. Co. v. Schuyler*, 17 How. Pr. 464); but such jurisdiction is not to be exercised, unless in extreme cases, and where most serious consequences would result from a refusal. (*Erie Railway Co. v. Ramsey*, *supra*). The court may also enjoin parties from proceeding before a surrogate's court, in a case where the defendant is estopped from prosecuting in that court. (*Pettigrew v. Foshay*, 12 Hun, 483). The jurisdiction in such matters depends upon the necessity for the interference of the court, to prevent the failure of justice. (*Morse v. Cloyes*, Seld. Notes, 184). The court will not usually restrain the prosecution of a suit, previously begun in a court of another state, or of the United States (*Williams v. Aryault*, 31 Barb. 364); but it may do so, if a special case is shown for it. (*Vail v. Knapp*, 49 Barb. 299; *Kittle v.*

Kittle, 8 Daly, 72; *Stevens v. Cent. Nat. Bk.*, 144 N. Y. 50; *Davis v. Cornue*, 151 N. Y. 172). It will restrain actions, subsequently commenced in a court of foreign jurisdiction, or threatened to be commenced therein, where it is necessary to prevent injustice or oppression (*Kittle v. Kittle*, *supra*); as where one threatens to sue in a court of an American consul abroad, who has no jurisdiction of the action (*Dainese v. Allen*, 3 Abb. Pr. N. S. 212), or where it appears that the suit is brought to vex, harass, or annoy the plaintiff *Claflin v. Hamlin*, 62 How. Pr. 284), but the facts showing that purpose must be alleged (*White v. Carton Book Binding Co.*, 10 Civ. Proc. Rep. 146); or where a party is seeking, in another state, a remedy totally inconsistent with the rights he has asserted in the courts of this state (*Garrison v. Marie*, 7 Civ. Proc. Rep. 113); or where it appears that the defendant had commenced, in the court of another state, a suit against the plaintiff, to recover the value of packages, upon a receipt and contract by the terms of which the plaintiff, according to a decision of the court of appeals of this state, was liable only for a specified sum, far below the value of the package, and which had been tendered to the defendant; but, according to the decision of the supreme court of the other state, was liable for the full value of the packages, and where the defendants were within the jurisdiction of the court. (*Dinsmore v. Neresheimer*, 32 Hun, 204). Proceedings in the courts of the United States will not be restrained, simply because the law is held differently in those courts, than in the courts of this state. (*Town of Thompson v. Norris*, 11 Abb. N. C. 163). A non-resident will not be restrained from suing in the courts of his own forum (*Barry v. Mut. Life Ins. Co.*, 2 T. & C. 15), but he may be enjoined from proceeding in the courts of this state as long as he prosecutes the action in the foreign jurisdiction. (*Allentown F. & M. Works v. Loretz*, 16 App. Div. 72). The ground upon which proceedings at law are enjoined is to restrain a multiplicity of suits. (*Third Ave. R. R. Co. v. Mayor, etc.*, 54 N. Y. 159). But, whether or not it will be done, is

always discretionary with the court. (*Pfohl v. Sampson*, 59 N. Y. 174).

Proceedings at law have been enjoined in the following cases: in an action to set aside a lease, a subsequent action by the defendant, to recover rent upon it (*Manneck Mfg. Co. v. Manneck*, 15 Wk. Dig. 558); in an action for divorce, where the husband has removed to another state, and has begun an action for divorce in that state (*Forrest v. Forrest*, 2 Edmund's Sel. Cas. 180); an action of ejectment by the grantee, to recover the lands embraced in a deed by mistake (*Bush v. Hicks*, 60 N. Y. 298); to prevent a creditor from suing an insolvent corporation, to obtain a preference, with the connivance of officers of the corporation (*Galwey v. U. S. Sugar Ref. Co.*, 21 How. Pr. 313; 13 Abb. Pr. 211); to restrain an action, enforcing a forfeiture under a contract, during the pendency of an action to correct a mistake in the contract. (*Humphreys v. Hurtt*, 3 Hun, 216). Wherever the object of the two actions is the same, the second action should be restrained. (*Schuehle v. Reiman*, 86 N. Y. 270). Ordinarily, the application for a stay should be by a motion in the action, and not by a new suit (*Savage v. Allen*, 54 N. Y. 458); unless the object of the action cannot be accomplished by a simple stay of proceedings in the action. (*Chappell v. Potter*, 11 How. Pr. 365). The stay of proceedings operates on the parties, and not upon the court. (*N. Y. & New Haven R. R. Co. v. Schuyler*, 17 How. Pr. 464). Wherever it is necessary, an injunction may run not only against the party, but also against the attorney, counsellor, and agents. (*Armitage v. Hoyle*, 2 How. Pr. N. S. 438). An injunction will not be granted, where the question presented is the same at law and in equity (*Wallack v. Society for Relief of Juv. Delinquents*, 67 N. Y. 23); nor where relief may be obtained by proper defense in the suit at law (*Savage v. Allen*, 54 N. Y. 458; *Hayward v. Hood*, 39 Hun, 596; *People v. Wasson*, 64 N. Y. 167, 170); as to when relief may be obtained at law, see *Cantoni v. Forster*, 12 Misc. 376; *affd.* without opinion, 146 N. Y. 405); nor where the party, moving for the stay, may intervene in the suit, and protect his

interest. (*Woodward v. Frost*, 19 Wk. Dig. 125). It will not be granted, to restrain a defendant from instituting legal proceedings against the plaintiff. (*Cowper v. Theall*, 40 Hun, 520). Trial by court-martial will not be stayed, because the plaintiff has been once tried and fears an unfair trial. (*Perault v. Rand*, 10 Hun, 222). A party cannot obtain an injunction, to restrain the commencement of an action, because of the serious injury which will result to him from it. (*Wolfe v. Burke*, 56 N. Y. 115).

(B.) *Judgments*. An injunction will issue to restrain proceedings upon a verdict, or the collection of a judgment, where it is made to appear, by facts of which the party could not avail himself as a defense, that the enforcement thereof would be contrary to equity or good conscience; but it will not interpose upon the ground that the verdict or judgment was erroneous; the error must be cured, if at all, in the action in which it occurred. (*N. Y. & Harlem R. R. Co. v. Haws*, 56 N. Y. 175; *Ladew v. Hart*, 8 App. Div. 150; *affd. on op. below*, 155 N. Y. 629). Where a defendant obtained a judgment, by falsely stating the causes of action, and thus inducing the plaintiff not to appear, he was restrained from enforcing the judgment. (*Hinckley v. Miles*, 15 Hun, 170). Wherever it is attempted to use fraudulently or inequitably, a judgment obtained in good faith (*Hawley v. Mancius*, 7 Johns. Ch. 174, 182); or where a judgment of a justice's court has been satisfied, and the plaintiff, if compelled to pay, has no remedy at law (*Mallory v. Norton*, 21 Barb. 424); or where the holder of a senior judgment, which has been paid, fraudulently keeps it alive, and is threatening to sell the debtor's real estate to collect it, to the prejudice of a junior judgment creditor (*Shaw v. Dwight*, 27 N. Y. 244); the collection of the judgment will be restrained by injunction.

Where, after the recovery of a judgment, the parties have made a new contract, which will supersede the judgment, the plaintiff will be restrained from carrying the judgment into effect, so far as it conflicts with the contract. (*Van Wagenen v. LaFarge*, 13 How. Pr. 16). The next of kin may enjoin the collection of a judgment

against the administrator, when it appears that the claim is unfounded, in whole or in part, and that the administrator was guilty of fraud or collusion, in permitting it to be recovered. (*Mayer v. Gilligan*, 2 N. Y. St. Rep. 702). Where land was sold on foreclosure, subject to a judgment, and primarily liable for its payment, and the purchaser has taken an assignment of the judgment, and was proceeding to collect it out of the estate of the mortgagor, an injunction was granted to restrain him. (*Rossow v. Bank of Commerce*, 22 Wk. Dig. 448). An injunction will not lie to restrain the collection of a judgment, because the defendant was not served with process; for the reason that the judgment is void, and the defendant has a complete remedy at law for anything which is done to collect it. (*Fullan v. Hooper*, 66 How. Pr. 75; 19 Wk. Dig. 93). In a case where the defendant was prevented from attending the trial, and where it was alleged that, by subornation of a witness, the plaintiff had recovered more than he ought to, and a new trial had been denied, an injunction to restrain the collection of a judgment was refused. (*Smith v. Lowry*, 1 Johns. Ch. 320). In an action on an award, where it was alleged that a witness swore falsely before the arbitrators, an injunction was refused to stay the action. (*Woodworth v. Van Buskerk*, 1 Johns. Ch. 432). Where a judgment had been satisfied, an injunction was refused to stay the sale under an execution issued upon it (*Lansing v. Eddy*, 1 Johns. Ch. 49); so, where the sheriff, upon a judgment against the property of an assignor, levies an execution on goods in the hands of the assignee. (*Dawson v. American Surety Co.*, 22 Wk. Dig. 562). In each of these cases, the injunction was refused, because the plaintiff had a complete remedy at law. An injunction was refused to restrain the execution of the sentence of an ecclesiastical court, where there was jurisdiction to make it. (*Walker v. Wainwright*, 16 Barb. 486). The holder of a subsequent mortgage is not entitled to a stay of the judgment of foreclosure of a prior mortgage. (*Bloomington v. Barnard*, 7 Hun, 459). Where it is sought to restrain the collection of a judgment or proceedings upon a verdict,

the party is not bound to seek his relief by motion in the original action; but he may institute an action for the purpose. (*N. Y. & Harlem R. R. Co. v. Haws*, 56 N. Y. 175).

(C.) *Summary Proceedings.* The proceedings upon a petition in a summary proceeding, before a final order, and the final order itself, which awards delivery of the possession to the petitioner, may be stayed by injunction, granted in an action against the petitioner. But such an injunction shall not be granted before the final order in the special proceeding, except in a case where an injunction would be granted to stay the proceedings in an action of ejectment, brought by the petitioner, and upon the like terms; or, after the final order, except in a case where an injunction would be granted to stay the execution of the final judgment, in such an action, and upon the like terms. (Co. Civ. Proc. § 2265). These proceedings are only stayed where it appears that the magistrate has no jurisdiction; or the proceeding is fraudulent or collusive; or when the plaintiff is making an oppressive use of the judgment; or when the plaintiff's title to the premises has terminated; or where the defendant has, subsequent thereto, acquired some interest or equity in the subject matter of the action, which should be protected. (*Knox v. McDonald*, 25 Hun, 268; *McRobert v. Harrison*, 20 Wk. Dig. 228; *Chadwick v. Spargir*, 1 Civ. Proc. Rep. 422; *Crawford v. Kastner*, 26 Hun, 440; *Potter v. Potter*, 59 App. Div. 140). It will not be granted where there is a legal defense to the proceedings (*Rapp v. Williams*, 4 T. & C. 174); or where there is a remedy by appeal. (*Jessurun v. Mackie*, 24 Hun, 624). Where summary proceedings and ejectment are begun at the same time, to recover the same premises, an action to restrain either will not lie, because a successful termination of either can be pleaded in bar of the other. (*Grissler v. Stuyvesant*, 67 Barb. 77). Section 620 of the code of civil procedure is applicable to an injunction obtained under section 2265, and an undertaking is, therefore, required. (*Potter v. Potter*, *supra*).

Subdivision 9.—NUISANCES.

A public nuisance will be restrained at the suit of the attorney general, if it injuriously affects or injures the public interests (*Atty. Gen. v. Cohoes Co.*, 6 Paige, 133); or an individual may maintain an action to restrain it, if he sustains damage by it, which is special and peculiar to him, as distinguished from the rest of the community, so that as to him it is a private nuisance. (*Milbau v. Sharp*, 27 N. Y. 611; *Buchholz v. N. Y. L. E. & W. R. R. Co.*, 148 N. Y. 640). If the thing complained of is in itself a nuisance, and the plaintiff's right is not doubtful, an injunction will issue to restrain imminent danger to property or irreparable injury. (*Mayor of Rochester v. Curtiss*, Clarke Ch. 336; *Phoenix v. Comm'rs of Emigration*, 1 Abb. Pr. 466; 12 How Pr. 1; *Health Dept. of N. Y. v. Purdon*, 99 N. Y. 237). To warrant a preliminary injunction to restrain a nuisance, the injury caused by it must be substantial (*Ninth Ave. R. R. Co. v. N. Y. Elevated R. R. Co.*, 3 Abb. N. C. 347; 7 Daly, 174; *Forty-second St. R. R. Co. v. Thirty-fourth St. R. R. Co.*, 52 Super. 252), and not trivial or merely nominal or temporary. (High on Injunctions, § 740). If the thing sought to be restrained is not in itself a nuisance, but only something which may, according to circumstances, prove to be so, the court will refuse to interfere; unless it is a case of strong and imperious necessity, or the right infringed has been previously established at law, or long enjoyed without interruption. (High on Injunctions, § 742; *Health Dept. of N. Y. v. Purdon*, 99 N. Y. 237, 241; *Mohawk Bridge Co. v. Utica & Schenectady R. R. Co.*, 6 Paige, 554). The fact that the plaintiff took possession of the premises, after the erection of the nuisance, does not preclude his right to restrain it. (*Campbell v. Seaman*, 63 N. Y. 568). But if the erection of the nuisance was encouraged by the plaintiff, a temporary injunction should not be granted to restrain it, upon his application. (*Harrison v. Newton*, 9 N. Y. Leg. Obs. 347). Within these rules, a preliminary injunction has been allowed to one who owns land to the center of

the street, to restrain the illegal construction of a street railroad, on the highway in front of his premises (*Thayer v. Rochester City & B. R. R. Co.*, 15 Abb. N. C. 52); to the owner of an inn for an unlawful obstruction of the highway on account of a change of grade (*Buchholz v. N. Y. L. E. & W. R. R. Co.*, 148 N. Y. 640); to one street railroad company against another, to restrain the illegal construction of a road by the defendant, on the route occupied by the plaintiff (*Forty-second St. R. R. Co. v. Thirty-fourth St. R. R. Co.*, 52 Super. 252); or from its operation after it was constructed. (*Central Crosstown R. R. Co. v. Met. St. Rwy. Co.*, 16 App. Div. 229); to restrain the erection of poles by an electric light company, in front of the plaintiff's premises (*Tiffany v. U. S. Illuminating Co.*, 67 How. Pr. 73); to restrain the use of a building for a slaughter-house (*Brady v. Weeks*, 3 Barb. 157), or for a melting house. (*Peck v. Elder*, 3 Sand. 126), or for a bawdy house. (*Cranford v. Tyrell*, 128 N. Y. 343). In case of a noxious trade, it is of no consequence that the plaintiff does not reside on his property; an injunction will be granted if the nuisance will diminish the value of it. (*Peck v. Elder*, *supra*). A temporary injunction has also been granted, to prevent an adjoining owner from jarring plaintiff's premises by the use of machinery. (*McKeon v. See*, 4 Robt. 449; *aff'd*. 51 N. Y. 300). A temporary injunction has also been granted, to restrain blasting on the lot of an adjoining owner, where it appeared that smaller blasts might be used effectively without damage. (*Hill v. Schneider*, 13 App. Div. 299). A preliminary injunction was refused, to prevent the use of defendant's premises for a blacksmith shop (*Doellner v. Tynan*, 38 How. Pr. 176); or for a coal yard. (*Russell v. Popham*, 3 N. Y. Leg. Obs. 272). The injunction should not forbid the acts absolutely, when it is possible to do them in such a way as not to be a nuisance; but it should forbid doing them in such a manner as to tend to cause the nuisance. (*McKeon v. See*, *supra*; *Snow v. Williams*, 16 Hun, 468).

Subdivision 10.—OFFICE AND OFFICIAL ACTS.

A preliminary injunction is rarely granted in an action of *quo warranto* (*People v. Draper*, 24 Barb. 265), either to restrain the defendant from exercising the office (*People v. Farley*, 1 How. Pr. N. S. 71), or to restrain a claimant from taking possession of it, under cover of title (*Mayor, etc., v. Conover*, 5 Abb. Pr. 171; *Morris v. Whelan*, 11 Abb. N. C. 64; *Coulter v. Murray*, 4 Daly, 506); or to restrain a public board from removing one of its officers. (*Palmer v. Bd. of Education*, 47 App. Div. 547); but an injunction has been granted restraining the members of a common council from removing the president of a city. (*Armatage v. Fisher*, 74 Hun, 167). The question of title to the office must be determined in the plaintiff's favor, before he can have an injunction, to restrain the defendant from exercising its duties. (*People v. Sampson*, 25 Barb. 254). Where the defendant, under and by appointment by the city controller, to be a deputy chamberlain, undertook by threats and violence, to oust the deputy in possession and doing the duties under a proper appointment, an injunction will issue to prevent it. (*Palmer v. Foley*, 36 Super. 14). An injunction will not lie in an action by the people, for the removal from an office of a corporation, of a person who has unlawfully entered into it, and is acting *de facto* (*People v. Conklin*, 5 Hun, 452); nor in an action against two individuals, to try the right to an office in a religious corporation. (*Hartt v. Harvey*, 32 Barb. 55). When an action has been brought to eject a clergyman from his possession of the church, where he is not rightfully in possession, but there was no one who claims the office, he will not be restrained from exercising its duties. (*Younes v. Ransom*, 31 Barb. 49). Where one, under an unlawful claim of title, threatens to seize books of a municipal corporation, the value of which cannot be estimated in damages, and it appears that the act will cause great delay in the public business, from the taking of the books, and their loss, an injunction will be granted to restrain it. (*Mayor, etc., v. Conover*, 5 Abb. Pr. 171). The officers of a municipal corporation

in peaceable possession, will be protected by injunction from an unauthorized usurpation. (*Tyack v. Bromley*, 4 Edw. Ch. 258; 1 Barb. Ch. 519).

Where officers have discretion to act, they will not be restrained (*LeRoy v. Mayor, etc.*, 4 Johns. Ch. 352); except where their proceedings are shown to be illegal, or corrupt, or in bad faith, or it appears that the proposed act will be a mere arbitrary exercise of power. (*Philips v. Wickham*, 1 Paige, 590; *Oswego Falls Br. Co. v. Fish*, 1 Barb. Ch. 547; *Hartwell v. Armstrong*, 19 Barb. 166; *Tribune Assn. v. Sun Print. Assn.*, 7 Hun, 175). The legislature cannot in any case be restrained by injunction, directly or indirectly. (*People v. Canal Board*, 55 N. Y. 390). Whether the chief executive officer of the state can be restrained by injunction, seems to be doubtful upon the authorities. As to the powers confided to his discretion, he is undoubtedly entirely independent of the judiciary. Whether or not he can be restrained by injunction in the exercise of ministerial powers, there is a hopeless conflict of authority. But the better opinion seems to be that he is not amenable to the control of courts. (*Hawkins v. Governor*, 33 Am. Dec. 346, note; *People v. Bissell*, 19 Illinois, 220; High on Extra. Leg. Rem, § 120; *People ex rel Broderick v. Morton*, 156 N. Y. 136). Many of the cases on the subject will be found collected in the note to the case first cited. As to all other administrative offices, there is no doubt of the jurisdiction of the court to restrain their conduct by injunction. (*Supreme Council of Chosen Friends v. Fairman*, 10 Abb. N. C. 162; *People v. Canal Board*, 55 N. Y. 390; *Western R. R. Co. v. Nolan*, 48 N. Y. 513). But such officers will not be restrained from proceeding under a statute itself void, unless it appears that they are acting under it, or threatening to do so, and that actual or material injury from such action is imminent. (*People v. Canal Board*, *supra*). An injunction may issue against the officers of a municipal corporation, in a taxpayers' action, brought under section nineteen hundred and twenty-five of the code of civil procedure. (*Ayres v. Lawrence*, 59 N. Y. 192). It will be granted against the common council of a city, to

prevent an illegal act, or the abuse or illegal exercise of a discretion, to the injury of the public, or of private rights (*Negus v. City of Brooklyn*, 10 Abb. N. C. 180); but the operation of the statute is confined to cases where the acts complained of are without power, or where corruption, fraud or bad faith, amounting to fraud, is charged. (*Talcott v. City of Buffalo*, 125 N. Y. 280). Highway commissioners will be restrained by injunction, from opening a highway through lands acquired by a railroad company for railroad purposes (*Prospect Park R. R. Co. v. Williamson*, 91 N. Y. 552; S. C. 18 Wk. Dig. 257); or from moving the plaintiff's house when the officials claim it encroaches upon the highway, and it is shown that it does not. (*Flood v. Van Wormer*, 147 N. Y. 284). As a general rule, equity will not interfere by injunction to restrain the enforcement of the criminal laws. (*Davis v. Am. Soc., etc.*, 75 N. Y. 362; *Coykendall v. Hood*, 36 App. Div. 558); it is impossible to define the cases in which courts of equity will intervene by injunction to prevent irreparable mischief. (*Davis v. Am. Soc., supra*). An injunction has been issued to the police commissioners of New York, to restrain them from interfering with the business of an express company engaged in interstate commerce (*Dinsmore v. The Board of Police*, 12 Abb. N. C. 436); and to restrain them from interference with the business and property of a manufacturer, engaged in the manufacture of iron, working on Sunday, where such interference would destroy his business and property. (*Manhattan Iron Works v. French*, 12 Abb. N. C. 446). In the case last cited, it was held that, although the courts had no power to restrain an illegal arrest solely because of its illegality, yet where an arrest was illegal, and would result in the destruction of business, it was within their jurisdiction to enjoin it. The police authorities may be restrained from invading the precincts of a private club house, when the intention is to interfere with its festivities, not amounting to a nuisance or a breach of the peace; but they will not be thus restrained, where the members of the club are selling liquor without warrant, to persons not members of the club. (*Cercle Fran-*

cais de L'Harmonie v. French, 44 Hun, 123; S. C. 35, Alb. Law J. 347). Injunctions have also been issued to the quarantine commissioners, restraining them from acquiring land not necessary for their purposes (*Town of Gravesend v. Curtiss*, 34 How. Pr. 261); and to commissioners of excise, restraining them from revoking a license, when the law gave them no power to do so. (*Kostar v. The Board of Excise*, Daily Reg. March 19th, 1886). But an injunction will not issue, to restrain a citizen from applying to a public officer for action in his behalf, unless his doing so would violate some agreement with others (*People v. Canal Board*, 55 N. Y. 390); nor to restrain a police commissioner from exercising supervision over citizens, where the remedy for the unlawful act is adequate at law (*Sterman v. Kennedy*, 15 Abb. Pr. 201); nor to restrain a commissioner of highways from laying out a highway, in a case where he might have power to do so, on allegation that the proceedings were irregular (*Albany & Northern R. R. Co. v. Brownell*, 24 N. Y. 345); nor to restrain him from removing a fence, certified to be an encroachment on the highway (*Hyatt v. Bates*, 40 N. Y. 164); nor to restrain a board of education from procuring fuel for a school house, at the suit of one who claims to have a contract to furnish it; for in such a case, he has an adequate remedy at law. (*French v. Board of Education*, 18 Wk. Dig. 149). The commissioners of pilots cannot be restrained by injunction, from removing an obstacle to navigation. (*Moore v. Board of Pilots*, 32 How. Pr. 184). An injunction was refused to restrain the board of health from suppressing a nuisance. (*Sickles v. New Rochelle Board of Health*, 41 Hun, 408). The court has no power to restrain assessors from exercising the duties of their office. (*Western R. R. Co. v. Nolan*, 48 N. Y. 513). Where the officer is sued in his individual name, an injunction restraining him from acting, will not bind his successor in office. (*Magee v. Cutler*, 43 Barb. 239).

Subdivision 11.—PERSONAL SERVICES.

Usually, an injunction will not lie to enforce a contract to render personal services, or to restrain its violation; as to restrain an actor, or singer, or danseuse from performing elsewhere than for the plaintiff, in violation of his contract. (*Fredericks v. Mayer*, 1 Bosw. 227; *Sanquirico v. Benedetti*, 1 Barb. 315; *Mapleson v. Del Puente*, 13 Abb. N. C. 144). But in *Daly v. Smith* (38 Super. 158), it was held that an injunction might be granted to restrain a violation of such a contract, when from such violation, irreparable damage would be sustained by the plaintiff; and in that case, where a theatrical manager made a contract for the dramatic season with a distinguished artist and a great artistic acquisition, intending to secure her dramatic services and her name, and to prevent her going elsewhere, and publicly announced her as a member of his company; the engagement of the actress to play during such season, at a rival theater in the same city, and the public announcement thereof, was held to present a case of irreparable damages, and that, although the actress was pecuniarily responsible, and the violation was enjoined. To the same effect see *Duff v. Russell* (60 N. Y. Super. Ct. Rep. 80). In *Roosen v. Carlson* (46 App. Div. 233), the court approved the doctrine as laid down in *Pomeroy on Specific Performance* [2 Ed.], § 24, in these words: "Where one person agrees to render personal services to another, which require and presuppose a special knowledge, skill and ability in the employe, so that in case of a default the same services could not easily be obtained from others, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach." An advertising agent has been held not to render unique and extraordinary services within this rule, and an injunction to restrain a breach of his contract of employment, was refused. (*W. J. Johnston Co. v. Hunt*, 66 Hun, 504; *affd.* on *op.* below, 142 N. Y. 621).

Subdivision 12.—PUBLICATIONS.

The publication of a libel cannot be restrained. (*Brandreth v. Lance*, 8 Paige, 24; *N. Y. Juv. Guard. Soc. v. Roosevelt*, 7 Daly, 188). The courts have jurisdiction to restrain a false publication, which is calculated to and does injure the plaintiff in his property rights. (*Briggs v. Vick*, 65 N. Y. 569; *Green v. U. S. Dealers Pro. Ass'n*, 39 Hun, 300). In the cases of *Wetmore v. Scorell* (3 Edw. Ch. 515), and *Hoyt v. McKenzie* (3 Barb. Ch. 320), it was held that an injunction to restrain the publication of private letters, could only be granted, where it appeared that the letters possessed a certain value as literary possessions, and not where they were merely friendly letters on private or domestic matters; but the superior court of the city of New York overruled these cases, and laid down the following rules as established:

1. That the writer of letters, whether they are literary compositions, or familiar letters, or letters of business, possesses the sole and exclusive right of publishing the same, and that without that consent, they can not be published either by the person to whom they are addressed, or by another.

2. That the receiver of the letters may, however, justify their publication, when it is shown to be necessary to the vindication of his own right or conduct, against unjust claims or imputations.

3. That if the receiver attempt to publish the letters, or any parts of them, against the wishes of the writer, and upon occasions not justifiable, a court of equity is bound to prevent the publication, by an injunction, as a breach of that exclusive property which the writer retains.

4. That as against a stranger, who has possessed himself of the letters, or of copies thereof, unlawfully, the right to restrain the publication by an injunction is absolute; such persons not being justified in publishing the letters for any purpose whatever. (*Woolsey v. Judd*, 4 Duer, 379).

The same rules were substantially laid down by Judge Story. (*Folsom v. Marsh*, 2 Story, 100). The asso-

ciated press has the right to news collected by it, until it is abandoned by publication; and a violation of that right will be restrained by injunction. (*Kiernan v. Manhattan Quo. Tel Co.*, 50 How. Pr. 194). One who receives quotations of the market prices from a telegraph company, under a contract not to publish them, will be restrained from doing so. (*Gold & Stock Tel. Co. v. Todd*, 17 Hun, 548). An injunction cannot be granted to restrain the publication of legal proceedings. (*Wood v. Marvinne*, 3 Duer, 674). The publication of a newspaper can only be restrained upon analogy to the law of trade marks. (*Dayton v. Wilkes*, 17 How. Pr. 510; *Railway Age Pub. Co. v. Garnett*, 17 Wk. Dig. 250). (For further decisions on this subject, see title Copy-right, above).

Subdivision 13.—PATENTS.

The courts of the state have no jurisdiction to restrain a party from the use of a patent, during the pendency of an action involving the title to it, or in any way to restrain their infringement. (*Continental Store Serv. Co. v. Clarke*, 100 N. Y. 365).

Subdivision 14.—TAXES AND ASSESSMENTS.

An injunction will not lie to restrain an assessment of a tax (*Western R. R. Co. v. Nolan*, 48 N. Y. 513); nor to restrain its collection, except under circumstances of great necessity, to prevent irreparable damage. (*Rome, Watertown & Ogdh. R. R. Co. v. Smith*, 39 Hun, 332; affd. 101 N. Y. 684). Where the owner of land shows that the enforcement of a tax will work irreparable injury to him, and he has no remedy by certiorari, and the tax is illegal, he may restrain its collection. (*Hanlon v. Suprs. of Westchester*, 8 Abb. N. S. 261; 57 Barb. 283). So, where a tax is void because the property is exempt from taxation. (*N. Y. Infant Asylum v. Sups. of Westchester*, 31 Hun, 116). An allegation that the taxation is illegal, and that unless restrained, the village authorities intend to collect it, and to assess and collect other taxes of a similar nature, will not warrant an injunction.

(*Pumpelly v. Village of Owego*, 45 How. Pr. 219; *Shulz v. City of Albany*, 42 App. Div. 437). In assessment cases the following rules have been established:

1. That the equitable power of the court can not be invoked for the purpose of restraining the proceedings of boards or officers of assessments. That is of legal and not equitable cognizance.

2. That a person is not entitled to an injunction, because his property has been illegally assessed, and such assessment is an apparent lien; to authorize equity to interpose, it must appear that the causes rendering the assessment void do not appear on the face of the proceedings, and would not appear by the evidence necessary to be given to enforce the assessment. (*Nichols v. Voorhis*, 18 Hun, 33). But even where such things appear, the collection of a mere personal assessment will not be restrained. (*Clark v. Village of Dunkirk*, 12 Hun, 181; *affd.* without op., 75 N. Y. 612). The collection of an assessment for the improvement of a street, which is illegal because part of the property directed to be assessed is omitted from it, will be restrained. (*Hassan v. City of Rochester*, 67 N. Y. 528). In the city of New York, errors and irregularities in the street assessments must be reviewed in the proceedings themselves, and cannot be corrected in collateral actions in equity. (*Mayer v. Mayor, etc.*, 101 N. Y. 284). Except under the taxpayer's act, a taxpayer cannot restrain the application of the proceeds of taxes. (*Kilbourne v. St. John*, 59 N. Y. 21). Under that act the levy of the tax may be restrained. (*Ayers v. Lawrence*, 59 N. Y. 192, 198, 199).

Subdivision 15.—TRADE MARKS, TRADE NAMES AND UNFAIR COMPETITION.

The court will interfere by injunction to prevent the pirating of trade marks. (*Amoskeag Mfg. Co. v. Spear*, 2 Sand. 599). It proceeds on the ground that the plaintiff has a valuable interest in the good will of the business, and that, having appropriated to himself a particular syllable or sign or trade mark, indicating that the article is manufactured or sold by him, or by his

authority, or that he carries on his business, at a particular place, he is entitled to protection against any one who attempts to pirate on the good will of his business, by sailing under his flag without his authority or consent. (*Partridge v. Menck*, 2 Barb. Ch. 101; 1 How. App. Cas. 547). In such cases injunctions are granted with great caution, and never where the legal right is disputed, or is doubtful, or where it will create a monopoly (*Amoskeag Mfg. Co. v. Spear*, *supra*); and wherever that appears, the court should never grant the injunction, until the case is heard. (*Wolfe v. Goulard*, 18 How. Pr. 64; *Howe v. Howe Mach. Co.*, 50 Barb. 236). It is not necessary, however, that the plaintiff should first establish at law his right to a trade mark. (*Hier v. Abrahams*, 82 N. Y. 519). Whenever the defendant admits that he intentionally simulated the plaintiff's name and trade mark, a preliminary injunction should be granted, as of course. (*Taylor v. Carpenter*, 11 Paige, 292; *affd.* 2 Sand. Ch. 603). To entitle the plaintiff to an injunction, the resemblance of a simulated to the genuine trade mark, should amount to a false representation as to the manufacture or ownership of the article. (*Popham v. Cole*, 66 N. Y. 69). It is immaterial, so far as an injunction is concerned, that there was no intention to infringe. (*T. A. Vulcan v. Myers*, 139 N. Y. 364). Moreover the injunction should be granted, although there is no evidence of actual deception, where it appears that it is liable to deceive. (*Id.*). The resemblance need not be perfect; any imitation is colorable, if it is such as to justify the conclusion that purchasers will be deceived, and imposed upon by it. (*Talcott v. Moore*, 6 Hun, 106). But such resemblance must come from an imitation or adoption of that which the plaintiff had a right to appropriate. (*Amoskeag Mfg. Co. v. Spear*, *supra*; *N. Y. Cab Co. v. Mooney*, 15 Abb. N. C. 152). An actual intent to defraud need not be shown to entitle the plaintiff to an injunction. (*Hier v. Abrahams*, 82 N. Y. 519). An injunction will not be granted where a plaintiff's trade mark is intended or calculated to deceive the

public; as where the name of a compound was deceptive as to its ingredients, or the advertisement was deceptive as to its qualities, or where the trade mark contains a false statement. (*Fetridge v. Wells*, 4 Abb. Pr. 144; *N. Y. Card Co. v. Union Playing Card Co.*, 39 Hun, 611). Even where it appeared that the defendant has deliberately, and without any previous connection with the particular business, adopted the emblems and appellations employed by the plaintiff, simply to break in on his trade and profit, an injunction was not granted, in a case where the plaintiff's trade mark was intended and fitted to deceive the public (*Fetridge v. Merchant*, 4 Abb. Pr. 156); so where it appears that the plaintiff was first in the field, the court has discretion to refuse the injunction, where such a course seems just. (*Hygeia Water Ice Co. v. N. Y. Hygeia Water Co.*, 140 N. Y. 94). A party will not be restrained from using his own name in his business, although thereby he injure the business of another, provided he does not resort to any artifice to mislead (*Meneely v. Meneely*, 62 N. Y. 427), but where the purpose in using the name is to mislead the public, its use will be enjoined. (*Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462). The use of a stolen name will be enjoined although it is not used in a commercial or trading business. (*Soc. of 1812 v. Soc. of 1812 in N. Y.*, 46 App. Div. 568). On the dissolution of a partnership, either member of the firm may use its trade mark, until he has been divested of the right. (*Hazard v. Caswell*, 93 N. Y. 259). One who has been in the plaintiff's employ, may set up the same business, and will not be restrained from putting on his sign the words "late with" the plaintiff. (*Van Wyck v. Horowitz*, 39 Hun, 237). A single sale of an article with a simulated trade mark, is sufficient to warrant an injunction. (*Low v. Hart*, 90 N. Y. 457). An injunction should not wholly forbid the use of the symbol, but only of the use of the imitation, colorable or otherwise, of the plaintiff's trade mark. (*India Rubber Co v. Rubber Comb, etc. Co.*, 45 Super. 258, 272). An injunction will not be granted, at the suit of one charged with the

infringement of a trade mark, to restrain the commencement of an action against him, and against buyers from him. (*Wolfe v. Burke*, 56 N. Y. 115).

Subdivision 16.—TRESPASSES.

An injunction is granted to restrain a trespass, only where the damage would be irreparable, or the value of an inheritance is put in jeopardy by it, or the aid of equity is necessary to quiet the possession, or prevent a multiplicity of suits. (*Livingston v. Livingston*, 6 Johns. Ch. 497; *Sixth Ave. Ry. Co. v. Kerr*, 28 How. Pr. 382; *Meyer v. Phillips*, 97 N. Y. 485; *Mulry v. Norton*, 100 N. Y. 424; *Garvey v. L. I. R. R. Co.*, 159 N. Y. 323). For these reasons, trespass upon mines, quarries, or timber is prevented by injunction. (*West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Norton v. Snyder*, 2 Hun, 82). An injunction will be granted to restrain threatened acts that, if repeated, might become the foundation of an adverse possession (*Johnson v. City of Rochester*, 13 Hun, 285), or where such acts injure the safety of the plaintiff's buildings, or impair their rental value, or obstruct lights, or destroy landmarks. (*Fox v. Fitzsimmons*, 29 Hun, 574; *affd. without op.*, 100 N. Y. 618). It will be granted to restrain a forcible intrusion upon premises occupied by a public bureau (*Health Dept. of N. Y. v. Police Dept.*, 41 Super. 323); to restrain an entry on a cemetery lot, and the removal of bodies interred there (*Thompson v. Hickey*, 8 Abb. N. C. 159); to restrain continued trespasses of a personal nature, which affect a corporate franchise (*Stage Horse Cases*, 15 Abb. Pr. N. S. '51); or where the defendant in an action to determine conflicting claims to real property, is interfering with the plaintiff's possession. (*Stamm v. Bostwick*, 30 Hun, 70). To warrant the granting of an injunction to restrain a trespass, the legal right should be clear. (*Howe v. Rochester Iron Mfg. Co.*, 66 Barb. 592). But it need not be first established by law. (*Lacustrine, etc. Co. v. Lake Guano Co.*, 82 N. Y. 476; *West Point Iron Co. v. Reymert*, 45 N. Y. 703). The legal right may be established,

and the injunction obtained in the same action (*Broiestedt v. South Side R. R. of L. I.*, 55 N. Y. 220). An injunction is only granted in very special cases, to restrain an apprehended trespass. (*Gentil v. Arnaud*, 1 Swe. 641). It will not be granted where the remedy at law is adequate. (*Marshall v. Peters*, 12 How. Pr. 218). In many cases where, by inadvertence or mistake, a large building encroaches a very small amount on the land of the adjacent owner, a mandatory injunction, requiring the owner of the building to tear it down, is refused, and the adjacent owner left to his remedy at law (*Crocker v. Manhattan Life Ins. Co.*, 61 App. Div. 226; *McSorley v. Gombrecht*, 30 Abb. N. C. 412, and note); nor will an injunction be granted to aid the owner of land, who is out of possession (*Troy & Bos. R. R. Co. v. B. H. T. & W. R. R. Co.*, 13 Hun, 60); nor to aid a trespasser, to prevent the owner from retaining possession. (*Littlejohn v. Attrill*, 94 N. Y. 619).

Subdivision 17.—TORTS.

An injunction will not lie to prevent a threatened illegal arrest (*Davis v. American Soc. etc.*, 75 N. Y. 362; *Kramer v. Police Dept.*, 53 Super. 492); although the person threatening the arrest is insolvent. (*Burch v. Cavanaugh*, 12 Abb. Pr. N. S. 410). An injunction will not be granted to restrain the further publication of a libelous advertisement, although it is alleged that the defendant is wholly irresponsible financially. (*De Wick v. Dobson*, 18 App. Div. 399). It will not lie to prevent strikers enticing away workmen, unless it appears that violence, force, and intimidation, or coercion is intended against them. (*Johnston's Harvester Co. v. Meinhardt*, 9 Abb. N. C. 393; *affd.* 24 Hun, 489; *Davis v. Zimmerman*, 91 Hun, 489). One will not be restrained by injunction from harboring plaintiff's wife and child, unless it affirmatively appear that he acted maliciously, and not from motives of humanity. (*Campbell v. Carter*, 3 Daly, 165). A threatened conversion of property will not be restrained by injunction. (*Thompson v. Hodgkin*, 13 Wk. Dig. 367). Nor will

one be enjoined from keeping a bawdy house (*Ander-son v. Doty*, 33 Hun, 160), unless it is shown that the plaintiff's use of his premises is interfered with thereby. (*Cranford v. Tyrrell*, 128 N. Y. 343). Nor will an injunction be issued to prevent a violation of a penal ordinance (*Village of Brockport v. Johnston*, 13 Abb. N. C. 468); nor to restrain its enforcement. (*Hodges v. Perine*, 24 Hun, 516). In a case where one defendant had, by forming a conspiracy, obtained the money of the plaintiff, which he had transmitted by registered letter to another one, and the letters were in the post-office, the defendant was enjoined from receiving them. (*Zellenkoff v. Collins*, 23 Hun, 156).

Subdivision 18.—WASTE.

During the pendency of any action in relation to real property, specified in title one of chapter fourteen, of the code of civil procedure, if the defendant commits waste upon, or does any other damage to the property in controversy, an injunction may be granted, restraining him from the commission of any further waste upon, or damage to the property. (Co. Civ. Proc. § 1681). Neither notice of the application for the injunction nor security is necessary for the validity of the order under this section. (Co. Civ. Proc. § 1681; *Littlejohn v. Lef-fingwell*, 40 App. Div. 13); nor need the order recite the grounds of the injunction, pursuant to section 610 of the code of civil procedure, and General Rule 13. (*Trustees, etc. v. Matteson*, 12 N. Y. St. Rep. 370). The provision of this section is substantially the same as that of the revised statutes. (2 Rev. Stat. 336, §§ 18, 19). Waste will be restrained, even where the title is in dispute, and the right doubtful, if the mischief is irreparable, or on account of defendant's irresponsibility, or otherwise, no relief at law can be granted. (*Spear v. Cutter*, 5 Barb. 486). The court will prevent the removal of timber already cut. (*Id.*; *Weatherby v. Wood*, 29 How. Pr. 404). An injunction will issue to restrain an alteration, by a lessee, of a dwelling house into a warehouse. (*Douglass v. Wiggins*, 1 Johns. Ch. 435).

The possessor of land, whose interest has been sold on execution, will be restrained from committing waste upon it. (*Talbot v. Chamberlin*, 3 Paige, 219). A mortgagor, or his grantee will be restrained from waste which impairs the security. (*Brady v. Waldron*, 2 Johns. Ch. 148; *Robinson v. Preswick*, 3 Edw. Ch. 246; *Selden v. Mann*, 2 N. Y. Leg. Obs. 328). An injunction for that purpose will be granted, at a suit of the purchaser, after a foreclosure, and before a confirmation of the sale. (*Mutual Life Ins. Co. v. Bigler*, 79 N. Y. 568). An allegation that the defendants are cutting trees, is sufficient to warrant an inference that they intend to commit future waste. (*Kidd v. Dennison*, 6 Barb. 9, 18). An injunction to prevent waste may be granted, although no action at law is pending. (*Kane v. Vanderburgh*, 1 Johns. Ch. 11). In summary proceedings, where the defendant is in possession under a judgment, from which a certiorari is pending, the defendant being insolvent, and the waste being serious, an injunction will be granted to restrain it. (*Spear v. Cutter*, 5 Barb. 486). If the acts of waste are admitted, and an intention to repeat them is alleged, an injunction will not be refused, because the injury has thus far been inconsiderable. (*Livingston v. Reynolds*, 26 Wend. 115). In a case where the defendant had as yet only threatened to commit waste, and was responsible, an injunction was refused. (*Griffin v. Winne*, 10 Hun, 571; *affd. on op. below*, 79 N. Y. 637).

Subdivision 19.—WATER RIGHTS.

A preliminary injunction will be granted to restrain a diversion of the waters of a stream, to the injury of the plaintiff (*Garwood v. The N. Y. C. & Hud. R. R. Co.*, 83 N. Y. 400); or to restrain interference with its natural flow (*Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191); or its obstruction, so as to cause it to overflow the plaintiff's lands (*Vernum v. Wheeler*, 35 Hun, 53); or the pollution of a stream of water, flowing through the plaintiff's lands. (*Seaman v. Lec*, 10 Hun, 607; *Chapman v. City of Rochester*, 110 N. Y. 273); and

so, also, an injunction has been issued against a municipal corporation to restrain it from operating wells and pumps on its own land, the effect of which operations is to tap the sub-surface water stored in the land of the plaintiff—an adjacent owner—the purpose of the corporation being to merchandise the water for a city water-supply. (*Forbell v. City of New York*, 164 N. Y. 522); an injunction was, likewise, sustained, where, under the same circumstances, the adjacent plaintiff's surface pond was lowered by such operations. (*Smith v. City of Brooklyn*, 160 N. Y. 357). A preliminary injunction will not be granted in such cases, however, unless the plaintiff shows a right to a perpetual injunction. (*Corning v. Troy Iron & Nail Factory*, 6 How. Pr. 89). The plaintiff need not first establish his title at law. (*Corning v. Troy Iron & Nail Fac.*, 40 N. Y. 191). The grounds for equitable interposition in such cases are two-fold:

1. The inadequacy of any legal remedy, to secure the party in the enjoyment of his right to have the water flow in its natural channel.

2. To prevent a multiplicity of suits, for damage accruing from the daily and continuous wrongful diversion of the stream. (*Corning v. Troy Iron & Nail Fac., supra*). The courts will not, except as above stated, restrain by injunction, interference with percolation, or with underground currents, by which the plaintiff's spring is supplied. (*Trustees of Delhi v. Youmans*, 45 N. Y. 362). Nor will they restrain interference with the flow of surface water, which is not a water course, except that they will not permit the owner of land, to collect the surface water, and cast it by drains or ditches in a stream, on the land of his neighbor. (*Barkley v. Wilcox*, 86 N. Y. 240; *Bloodgood v. Ayres*, 108 N. Y. 400). The motive with which one interferes with a water course is not important; however malicious it may be, he will not be restrained from exercising his legal right. (*Phelps v. Nowlen*, 72 N. Y. 39).

ARTICLE III.

PROCEEDINGS TO OBTAIN THE ORDER.

SECTION.

1. When application may be made.
2. By whom granted.
3. Notice of application.
4. Papers on which granted.
5. When injunction may be granted to defendant.
6. Filing papers.

Sec. 1. When Application May Be Made.

The order may be granted, to accompany the summons, or at any time after the commencement of the action, and before final judgment. (Co. Civ. Proc. § 608). The phrase "during the pendency of the action," as used in sections 603 and 604, means the same thing in each case: *i. e.* the time when the threatened injury is likely to take place—not the time when the injunction order may be granted. (*People ex rel Cauffman v. Van Buren*, 136 N. Y. 252). The order may be granted before service of the summons, and served with it, and it will become operative as soon as the action is begun, whether the injunction is sought under section 603 or section 604. (*Leffingwell v. Chave*, 5 Bosw. 703; *Peo. ex rel Cauffman v. Van Buren*, *supra*). Delay in making the application is prejudicial to it. (*Thursby v. Mills*, 11 How. Pr. 116). The application must be made before judgment; and the court has no power to grant or revive, or continue a temporary injunction, after judgment in the action. (*Spears v. Matthews*, 66 N. Y. 127; *Jackson v. Bunnell*, 113 N. Y. 216).

Sec. 2. By Whom Granted.

Subdivision 1.—THE GENERAL RULE.

Except where it is otherwise specially prescribed by law, an injunction order may be granted by the court, in which the action is brought, or by a judge thereof, or by any county judge; and where it is granted by a

judge, it may be enforced as the order of the court. (Co. Civ. Proc. § 606). The application for an injunction is a non-enumerated motion, and if made to the court, it should be made at special term. (General Rule 38). A motion for an injunction may be made at the appellate division, which has power to grant, revive, and continue a temporary injunction (*Matter of Barkley*, 42 App. Div. 597; app. dismissed, 161 N. Y. 647; *Drake v. Hud. Riv. R. R. Co.*, 2 Co. Rep. 67; *Disbro v. Disbro*, 37 How. Pr. 147), but usually, that court will not hear an original application for an injunction. In actions for the judicial supervision of a corporation, and of the officers and members thereof, brought pursuant to section seventeen hundred and eighty-one of the code of civil procedure; and actions by a judgment creditor for sequestration, brought under section seventeen hundred and eighty-four; and actions to dissolve a corporation, under section seventeen hundred and eighty-five; and actions in behalf of the people, by the attorney general, under sections seventeen hundred and ninety-seven, and seventeen hundred and ninety-eight, a temporary injunction can only be granted by the court. (Co. Civ. Proc. §§ 1787, 1806). An injunction order, suspending the general and ordinary business of a corporation, or of a joint stock association, consisting of seven or more persons, or suspending from office, or restraining from the performance of his duties, a director, trustee, or other officer thereof, can only be granted by the court. (Co. Civ. Proc. § 1809). An injunction against the board of health of New York, can only be granted by the supreme court, at a special term thereof. (Greater New York Charter § 1260). The power of a judge to grant an injunction, is derived only from section six hundred and six of the code of civil procedure. Section seven hundred and seventy-two does not apply. (*People v. Edson*, 52 Super. 53). In this case it was held that a judge of the court of common pleas was not a county judge, and could not grant an injunction in the superior court, but the case is apparently adverse to the case of the *People ex rel Ireland v. Donohue* (15 Hun, 446), and *Matter of Morgan* (56

N. Y. 629). The power of the county judge is not restricted to cases triable in his county, or in which the counsel resides within his county. (*Kennedy v. Simmons*, 1 Hun, 603). The county judge may make an order to show cause why an injunction should not be issued. (*Babcock v. Clarke*, 23 Hun, 391). The special county judge has the same power in this regard, as is conferred upon a county judge. (*Id.*). An injunction order, made by a judge, is a mandate of the court, and has the same force and effect as if made by the court. (*People ex rel Negus v. Dwyer*, 90 N. Y. 402). A judge, disqualified by affinity to act, cannot make the order. (*N. Y. & New Haven R. R. Co. v. Schuyler*, 28 How. Pr. 187).

Subdivision 2.—AGAINST STATE OFFICERS.

Where a duty is imposed by statute upon a State officer, or board of State officers, an injunction order, to restrain him, or them, or a person employed by him or them, from the performance of that duty, or to prevent the execution of the statute, shall not be granted, except by the supreme court, at a term thereof, sitting in the department, in which the officer or board is located, or the duty is required to be performed; and upon notice of the application therefor, to the officer, board, or other person to be restrained. (Co. Civ. Proc. § 605).

Sec. 3. Notice of Application.

The order may be granted, upon or without notice, in the discretion of the court or judge, unless the defendant has answered; in which case, it can be granted, only upon notice, or an order to show cause. Where an application for an injunction is made, upon notice, or an order to show cause, either before or after answer, the court, or judge may enjoin the defendant, until the hearing and decision of the application. (Co. Civ. Proc. § 609). The provision of section 768 of the code of civil procedure, requiring all motions or applications made in an action or proceeding after any of the defend-

ants have appeared to be made to the court, is not to be deemed in conflict with section 609; section 609 allowing this particular application to be made to a judge is controlling, rather than the general provision contained in section 768. In the following cases, an injunction can only be granted upon notice; against a state officer, or a board of state officials (Co. Civ. Proc. § 605); to suspend the general and ordinary business of a corporation (Co. Civ. Proc. § 1809); against the board of health of New York. (Greater New York Charter, § 1260). Notice of the application for an injunction, is required in all cases after answer; and a so called "supplementary" injunction order, which enjoins acts not prohibited in the original injunction order, should not be granted *ex parte* after answer (*Rhodes v. Wheeler*, 48 App. Div. 410); before answer, it is discretionary with the court, except in the cases where the statute expressly requires notice to be given. An application for an injunction, is not an ordinary proceeding in the action, under section seven hundred and ninety-nine, so as to entitle a defendant, who has not appeared, to notice of the application. (*Becker v. Hager*, 8 How. Pr. 68). An injunction should not be granted *ex parte*, unless a pressing necessity appears. (*Androvette v. Bourne*, 15 How. Pr. 75; *Redfield v. Middletown*, 7 Bosw. 649). On an application to restrain an official act, an *ex parte* injunction should not usually issue; but an order to show cause should be made. (*Westheimer v. Schultz*, 33 How. Pr. 11, note). An order to show cause may be made returnable before a judge, although he resides in another judicial district, than that in which the action is triable. (*Harold v. Hefferman*, 42 How. Pr. 241). An irregularity, in giving the proper notice is waived, if the defendants proceed with the hearing, without objection. (*Health Dept. v. Police Dept.*, 41 Super. 323). Where an injunction is granted, until the further order of the court, and an order to show cause, why it should not be continued, is made, an express order of continuance is not necessary, for the court will not dissolve it, except on the defendant's motion. But it is otherwise,

upon a return of an order to show cause, why an injunction should not be granted, and a restraining order, in the meantime. (*Kelly v. Jeroloman*, 7 Robt. 158).

Sec. 4. Papers on Which Granted.

The order may be granted, where it appears to the court, or judge, by the affidavit of the plaintiff, or any other person, that sufficient grounds exist therefor. (Co. Civ. Proc. § 607). This section applies to injunctions granted under section 603 as well as those granted under section 604. (*Clark v. King & Bro. Pub. Co.*, 40 App. Div. 405). Any application made under section six hundred and three of the code, must be accompanied by a complaint, showing that the plaintiff is entitled to the injunction, as a part of the final relief demanded. (*Sanders v. Ader*, 26 App. Div. 176). In the case of *Mattice v. Gifford* (16 Abb. Pr. 246), it was suggested that an affidavit, which contained a statement of the facts constituting the cause of action, and also of the relief which would be asked, was sufficient as a complaint; but that suggestion was overruled by Judge Brady, in the case of the *Central Cross Town R. R. Co. v. The Bleecker Street and Fulton Ferry R. R. Co.* (49 How. Pr. 233), in which Judge Brady characterized the suggestions in *Mattice v. Gifford*, as forced and unnatural, and the later cases have settled the question, that an actual complaint must be presented, before the plaintiff can obtain an injunction under section six hundred and three, where the right to it depends upon the nature of the action. Where the application is made in such an action, the affidavits can only be used, as proof of the facts alleged in the complaint, and if the facts upon which the plaintiff relies, are stated only in the affidavit, and not in the complaint, they will not be considered by the court, in granting the injunction. (*Stull v. Westfall*, 25 Hun, 1). Where the application is made under section six hundred and four, when the right to the injunction depends upon extrinsic facts, it may be granted upon affidavits, before the complaint is served. (*Contl. Store Service Co. v. Clark*, 7 Civ. Proc. Rep. 183; 100 N. Y. 365). A verified pleading

is considered as an affidavit, and this was the rule before the code of civil procedure was passed (*Fowler v. Burns*, 7 Bosw. 637); and it is now made the rule, by the code itself. (Co. Civ. Proc. § 3343, subd. 11; *Bertha Zinc etc. Co. v. Clute*, 7 Misc. 123). Where, however, a verified complaint is used as the affidavit, on which the application is made, if it contains allegations on information and belief, an ordinary verification is not sufficient (*Hecker v. Mayor etc.*, 18 Abb. Pr. 369; *Bostwick v. Elton*, 25 How. Pr. 362; *Cushing v. Ruslander*, 49 Hun, 19); in other words, a complaint used as an affidavit, is subject to the ordinary rules governing affidavits on applications for provisional remedies, and only such allegations can be taken as true, as are stated positively or, if stated on information and belief, where the sources of the information and the grounds of belief are given. (*Clark v. King & Bro. Pub. Co.*, 40 App. Div. 405). Where application is made under section 603, it is necessary to have a complaint, and that complaint must contain all the requisite allegations to entitle the plaintiff to the injunction, as shown above; it is also necessary to satisfy the court that "sufficient grounds exist therefor." (Co. Civ. Proc. § 607). Under section 607 an allegation in a complaint upon information and belief does not so satisfy the court, unless the sources of the information and the grounds of the belief are stated in the verification thereof. It is apprehended that the court may also be satisfied on this point by submitting affidavits to furnish the *evidence* of the allegations contained in a complaint stating a requisite cause of action upon information and belief. (*Bagg v. Robinson*, 12 Misc. 299, 303). All the facts upon which the plaintiff relies to procure the injunction, must be established by positive affidavits (*Crocker v. Baker*, 3 Abb. Pr. 182); or if the allegations are made upon information and belief, the sources of the information and the grounds of the belief, must be stated, so that the court may decide whether or not they are sufficiently established. (*People v. Mayor etc.*, 9 Abb. Pr. 253). If the motion for an injunction is opposed, the order will be refused, where the material

facts which are alleged only upon information and belief, are denied by the defendant. (*Pidgeon v. Oatman*, 3 Robt. 706; *Livingston v. Bank of New York*, 5 Abb. Pr. 338). It is provided in section six hundred and thirty of the code of civil procedure that a verified answer has only the effect of an affidavit, both upon the hearing of a contested application for an order, or to vacate, or modify the order. Since that section has become a law, the rule that, where the equities of the complaint are positively denied by the answer, the injunction must be vacated, seems to be abolished, and denials in the answer have no further effect than denials made in an affidavit. (*R. W. & O. Terminal R. Co. v. City of Rochester*, 46 Hun, 149).

Sec. 5. When an Injunction may be Granted to Defendant.

Where the defendant interposes a counter-claim, and thereupon demands an affirmative judgment against the plaintiff, his right to a provisional remedy is the same, as in an action brought by him against the plaintiff, for the cause of action stated in the counter-claim, and demanding the same judgment. And for the purpose of applying to such a case, the provisions of this act, the defendant is deemed the plaintiff, the plaintiff is deemed the defendant, and the counter-claim so set forth in the answer, is deemed the complaint. (Co. Civ. Proc. § 720).

Sec. 6. Filing Papers.

The affidavits upon which the injunction is granted, must be filed forthwith, in the office of the proper clerk; and if the party, obtaining the injunction, fails to file such affidavits, the opposite party shall be at liberty to move the court to vacate the proceedings. (General Rule 4). The proper clerk, with whom these papers are to be filed, is, if the action is in the supreme court, the county clerk of the county where the place of trial is laid, or if it is in a superior city court, the office of the clerk of that court. Where a party, by inadvertence, fails to file the affidavits upon which the injunction is granted, the court may relieve him with or without terms. (*Leffingwell v. Chave*, 5 Bosw. 703).

ARTICLE IV.

THE ORDER.

SECTION.

1. Contents of the order.
2. Service.
3. Effect of the order.
4. Violation of the order.
5. Punishment of violation.

Sec. 1. Contents of the Order.

The injunction order must briefly recite the grounds for the injunction. (Co. Civ. Proc. § 610; General Rule 13). An omission to state the grounds of the order, as required by this section of the code, is not a jurisdictional defect, but is only an irregularity, for which the injunction may be set aside, but if no substantial right of the defendant has been violated, it will be disregarded. (*A. & P. Tel. Co. v. B. & O. R. R. Co.*, 46 Super. 377; 87 N. Y. 355). The order should be clear and explicit in its terms; it should show on its face all those things, which it is necessary for the defendant to know, in order to obey it, and it should plainly indicate to the defendant specifically all the acts which he is thereby restrained from doing, without calling upon him for inference, or for conclusions, only to be arrived at by a more or less uncertain process of reasoning, and about which the parties might well differ in opinion, either as to the facts or law. The act prohibited must be the doing of some tangible or distinct thing, or series of things, to be clearly pointed out and described. (*Lyon v. Botchford*, 25 Hun, 57; *Laurie v. Laurie*, 9 Paige, 234). It is not a sufficient compliance with this section to set forth in the order the exact language of section 603, with nothing further (*Hotchkiss v. Hotchkiss*, 19 N. Y. St. Rep. 767); but a recital of the several acts of the defendant complained of, with a statement in the language of the section is sufficient. (*Richards v. Goldberg*, 57 N. Y. St. Rep. 565). The injunction should never go beyond the allegations of the complaint, or the prayer for relief, so as to give to

the plaintiff any greater relief than he is entitled to. (*Loomis v. Thirty-fourth St. R. R. Co.*, 38 Hun, 517). But an order which does this is not void; it is at the worst only irregular. (*Mayor etc. v. N. Y. & S. I. Ferry Co.*, 64 N. Y. 622). The order should restrain only the parties to the action (*Fellows v. Fellows*, 4 Johns. Ch. 25), and their servants and agents. (*Farrington v. Birdsall*, 5 Wk. Dig. 421). The agent may be restrained by name, and if he is in fact the agent, it will not vitiate the injunction (Id.), but it is not usual to insert the name of the agent, unless there is some special reason for it. The order should never restrain persons who are not parties to the action, unless they are agents or servants of the persons restrained. (*Sage v. Quay*, Clarke Ch. 347). But the defendant will not be heard to object, if a person not a party to the action is restrained. It was held in *Brodie v. Cronley* (3 Edw. Ch. 355), that the injunction should never be antedated, and if it was so, it would be set aside on motion, but under the present practice, the antedating of the injunction would be a mere technical irregularity, if it is an irregularity at all, and the injunction would probably not be set aside for it, unless it was made to appear that some right of the defendant was affected. It is not necessary for the injunction order to contain any direction as to the undertaking. (*Manley v. Leggett*, 62 Hun, 562).

Sec. 2. Service.

Where the injunction is granted by the court, it must be served by delivering a certified copy thereof; where it is granted by a judge, it must be served by showing the original order, and delivering a copy thereof. Service of the order upon a corporation, may be made as prescribed in this act, for making personal service of a summons upon a corporation. Copies of the papers, upon which the order was granted, must be delivered with the copy of the order. (Co. Civ. Proc. § 610). The injunction cannot be regularly served before the summons, but the order of injunction and the summons may be served together. (*Leffingwell v. Chave*, 5 Bosw.

703). The rule requiring service of a copy of the papers is imperative (*McFarland v. Delaney*, 3 Law. Bull. 93); and a failure to do so is ground for setting aside the service of the injunction, but never for vacating the injunction order itself. (*Penfield v. White*, 8 How. Pr. 87). The undertaking must be served with the papers. (*McFarland v. Delaney*, 3 Law. Bull. 93). If the copy of the undertaking which is served, does not show that it was approved, although the original may have been properly approved, costs will be imposed as a condition of allowing service of a new copy. (*Augrich v. McOwen*, 4 Law. Bull. 66). A failure to serve copies of the papers does not relieve the party from the duty of obedience to the injunction. (*Davis v. The Mayor etc.*, 1 Duer, 451; *affd., sub. nom., People v. Sturtevant*, 9 N. Y. 263). The only remedy of the defendant in such a case, is by motion to set aside the service.

Sec. 3. Effect of the Order.

However improvident or irregular the injunction may be, it must be obeyed, and the party who disobeys it will be punishable for contempt, if the court had jurisdiction to grant it. (*Erie Ry. Co. v. Ramsey*, 45 N. Y. 637; *Peo. ex rel Cauffman v. Van Buren*, 136 N. Y. 252). If, however, the injunction was void, because granted without jurisdiction, it is otherwise. (*People ex rel Roosevelt v. Edson*, 52 Super. 53). The parties to the action are bound by the injunction (*Neale v. Osborne*, 15 How. Pr. 81); and so are their agents or servants, although not named in it. (*Farrington v. Birdsall*, 5 Wk. Dig. 421). One, not a party to the action, is liable as agent, only when he bears such a relation to the defendant, as will enable the defendant to control his action in regard to the subject matter, as to which the injunction issues. (*Batterman v. Finn*, 32 How. Pr. 501; 34 How. Pr. 108). If a corporation is enjoined, any of its officers, agents, or servants, who have notice of the injunction, are bound by it, although they are not served. (*People ex rel Davis v. Sturtevant*, 9 N. Y. 263; *Rorke v. Russell*, 2 Lans. 242; *A. & P. Tel. Co. v. B. & O. R. R. Co.*, 46 Super. 377 · 97 N. Y. 355). As to

third parties, who are not agents of the persons restrained, the injunction only operates as a notice to such persons, and they are not liable for its violation. (*Edmonston v. McLoud*, 19 Barb. 356; 16 N. Y. 543). A party to the action, who is restrained by the injunction, is bound by it, and liable to be punished for violation of it, although the original is not shown to him at the time of its service, if he makes no motion to vacate the service. (*Billings v. Carver*, 54 Barb. 40; *Ewing v. Johnson*, 34 How. Pr. 202). Where the injunction was served only upon the attorney of the party, and notice of it was clearly brought home to the party himself, it was held that he was bound to obey it. (*People v. Brower*, 4 Paige, 405; *Kochler v. Farmers & Drovers' Nat. Bk.*, 17 Civ. Proc. Rep. 307). He is also bound to obey the injunction, although it is not served at all, if he has actual notice that the order has been granted, and sufficient information of its contents to enable him to obey it. (*Abell v. N. Y. L. E. & W. R. R. Co.*, 18 Wk. Dig. 554; *affd.* without op., 100 N. Y. 634; *Hull v. Thomas*, 3 Edw. Ch. 236). Where an injunction is granted until the further order of the court, with an order to show cause why it should not be continued, it remains in force until it is dissolved. (*Kelly v. Jeroloman*, 7 Robt. 158; *Stubbs v. Ripley*, 39 Hun, 626).

Sec. 4. Violation of the Order.

Injunction orders must be fairly and honestly obeyed, and are not to be defeated by subterfuges and tricks, on the part of those bound to obey them; they may be violated by aiding, countenancing and abetting others in violation thereof, as well as doing it directly, and the courts will not look with indulgence upon schemes, however skillfully devised, designed to thwart its orders. (*Mayor etc. v. N. Y. & S. I. Ferry Co.*, 64 N. Y. 622). Willful disregard by members of an association, of an injunction in which they are named as members, is a breach of it. (*Rorke v. Russell*, 2 Lans. 242). If the party restrained, permit the act which is enjoined, to be done, by one over whom he has control, or if he assists or directs his servants or partners in doing such

an act (*Neale v. Osborne*, 15 How. Pr. 81), or encourages it, he is guilty of a violation of the order. (*Wheeler v. Gilsey*, 35 How. Pr. 139). The fact that the order has been appealed from, does not affect its operation, so as to permit the party to disobey it. (*Power v. The Village of Athens*, 19 Hun, 165).

Sec. 5. Punishment for Violation.

Violation of the injunction order is to be punished by proceedings for contempt, to which reference is made. In these proceedings, the court is required to impose upon the offender a fine, sufficient to indemnify the injured party for the loss or injury, which he may have sustained. (Co. Civ. Proc. § 2284). But, although a party who has obtained an injunction, which has been violated by his adversary, may proceed against him for contempt, in which case, the damages he has sustained will be included in the fine; he is not restricted to that mode of procedure. He may bring an action at law, to recover the damages which he has sustained by reason of the violation of the injunction. The proceeding as for contempt is not a substitute for an action, but is a concurrent remedy. (*Porous Plaster Co. v. Seabury*, 43 Hun, 611). A corporation may be fined for the violation of the injunction. (*Mayor etc. v. N. Y. & S. I. Ferry Co.*, 64 N. Y. 622). Not only will the parties to an action, who are restrained, or their agents, or servants, be punished for violation of the injunction, but those who, with knowledge of it, willfully aid, abet, or countenance others to violate it, are liable to punishment. (*A. & P. Tel. Co. v. B. & O. R. R. Co.*, 46 Super. 377; 87 N. Y. 355). If the violation was done under advice of counsel, it will not protect the party from punishment for the contempt. (*Ciancimono T. & T. Co. v. Ciancimino*, 43 N. Y. St. Rep. 49; affd. without op., 133 N. Y. 672; *Stubbs v. Ripley*, 39 Hun, 626, 630; *People v. Compton*, 1 Duer, 512). The fact that the act was done under advice of counsel, will, however, be considered in fixing the punishment, and in certain cases, where it is so done, the party thus acting will be allowed to remedy the evil by complying

with the order, where that is possible (*Grimm v. Grimm*, 1 E. D. Smith, 190); and the court will be influenced thereby sometimes, to limit the punishment to such a fine only, as will indemnify the injured party, and will not otherwise punish him for the contempt (*Lansing v. Easton*, 7 Paige, 364; *Power v. The Village of Athens*, 19 Hun, 165; *Gray v. Thomas*, N. Y. Law Jour., July 12, 1901, pp. 1333, 1335); but before the court will regard such advice at all, the names of counsel must be given, and the information that was laid before them, and the exact import of their advice must be fully stated. If the advice was written, the writing must be produced; if oral, the fact that it was given, and its precise import must be verified by the counsel who gave it. (*People v. Compton*, 1 Duer, 512). But the fact that the party disobeying the injunction proceeded upon the advice of counsel will not always necessarily relieve him from an imposition of a fine, by way of punishment, in addition to such a one as will indemnify the aggrieved party. He who resists the order or process of a court, trusting to his own belief of its want of jurisdiction, or of the propriety of its action, acts in all cases at his own peril, and when he is proved to be mistaken, he is liable to be justly punished. (*People v. Compton*, 1 Duer, 512). Where the injunction is vague in its terms, so that there is a question as to what is necessary to be done to obey it, that fact will be considered in proceedings to punish for a violation of it. (*Lyon v. Botchford*, 25 Hun, 57).

ARTICLE V.

SECURITY.

SECTION.

1. On staying proceedings in an action.
2. In other cases.
3. Security in special cases.
4. New undertaking on motion to vacate.

Sec. 1. On Staying Proceedings in an Action.

An injunction order shall not be granted, to stay the trial of an action, in which the complaint demands judgment for a sum of money only, after issue has been

joined therein, unless the party applying therefor, gives an undertaking to the party enjoined, with sufficient sureties, to the effect, that he will pay to the party enjoined, or his representatives, all damages and costs, which may be recovered by him in the action stayed by the injunction, not exceeding a sum specified in the undertaking; and, also, all damages and costs that may be awarded to him, in the action in which the injunction order is granted. (Co. Civ. Proc. § 611).

An injunction order shall not be granted, to stay proceedings in an action specified in the last section, after verdict, report, or decision, and before final judgment thereupon, unless a sum of money sufficient to cover the sum awarded by the verdict, report, or decision, and the costs of the action, is first paid, by the party applying for the injunction, into the court, in which his action is commenced, or an undertaking for the payment thereof, with interest, is given as prescribed in this article. (Co. Civ. Proc. § 612).

An injunction order shall not be granted, to stay proceedings upon a judgment for a sum of money, unless the following requisites are complied with by the party applying therefor:

1. The full amount of the judgment, including interest and costs, must be paid by him, into the court in which his action is commenced; or an undertaking, in lieu thereof, must be given, as prescribed in this article.

2. He must also give an undertaking, with sufficient sureties, to pay to the party enjoined, all damages and costs, which may be awarded to him by the court, in the action in which the injunction order is granted; not exceeding a sum specified in the undertaking. (Co. Civ. Proc. § 613).

An injunction order shall not be granted to stay proceedings in an action of ejectment, or for dower, after verdict, report, or decision, unless the party applying therefor gives an undertaking, with sufficient sureties, to pay to the party enjoined, or his representatives, all damages and costs, not exceeding a sum specified in the undertaking, which may be awarded to him in the action wherein the injunction was granted. (Co.

Civ. Proc. § 616). These sections do not apply to the city court of the city of New York. (Co. Civ. Proc. § 3160). A failure to give the bonds, as required by these sections, is a fatal defect upon appeal from the order (*Carpenter v. Keating*, 10 Abb. Pr. N. S. 223; *Eastman v. Starr*, 22 Hun, 465); but the plaintiff may be permitted to give the proper security *nunc pro tunc* upon terms. (*Manley v. Leggett*, 62 Hun, 562). A judgment entered upon confession is within these sections. (*N. Y. Sec. & Tr. Co. v. Lipmar*, 83 Hun, 569; *Farrington v. Freeman*, 2 Edw. Ch. 572). Any order, which operates to stay the plaintiff from proceeding against his judgment debtor, is within its provisions (*Christie v. Bogardus*, 1 Barb. Ch. 167); but an injunction which restrains the sale of the plaintiff's property, on a judgment and execution against a third person, does not require security under this section. (*Hegeman v. Wilson*, 8 Paige, 29). It is to be noted that no security is required by section 611, for an order staying proceedings in an action in which issue has not been joined. (*Richards v. Goldberg*, 7 Misc. 388). It is not necessary for a judgment creditor of an insolvent corporation, who brings suits to restrain other creditors from proceeding at law, and for the appointment of a receiver, and an equitable distribution of the property, to give a bond or make a deposit, to entitle him to an injunction. (*Hutchinson v. N. Y. C. Mills*, 2 Abb. Pr. 394). The act of the sheriff, in paying over money collected upon execution cannot be enjoined without giving an undertaking under this section. (*Boker v. Curtis*, 2 Edw. Ch. 111). Where the plaintiff applies for an injunction, against the enforcement of a judgment, upon lands conveyed to him by a partner in a firm, against which judgments had been recovered which were claimed to be a lien on such lands, until the equities of the parties can be determined, he must give an undertaking, or pay the amount of the judgment into court, as required by this section. (*Rossov v. The Bank of Commerce*, 22 Wk. Dig. 448). If, upon an application for an injunction, it is claimed that the judgment is partly paid, the payments must be set out and sworn to posi-

tively, so the court can see how much is due on the judgment, to enable it to fix the amount of the bond or deposit. (*Christie v. Bogardus*, 1 Barb. Ch. 167). An undertaking, on an injunction to restrain summary proceedings, should contain the provision required by section six hundred and twenty, to pay such damages as shall be sustained by reason of the injunction, and not contain the condition specified in section six hundred and thirteen. (*Gilman v. Prentice*, 11 Civ. Proc. Rep. 310). In a case, where money is required, by the foregoing sections of this article, to be paid into court, the court or judge may dispense with the payment, and may require the party to give, in lieu thereof, an undertaking, with two or more sureties, to pay the sum specified, with interest, as directed by the court. If an undertaking is required, in addition to the deposit, both undertakings may be contained in the same instrument, at the election of the party applying for the injunction. (Co. Civ. Proc. § 618). The party will not usually be required to give a deposit, unless the plaintiff is insolvent; the fact that the defendant fears he will be insolvent, is not sufficient to warrant it. (*Rodgers v. Rodgers*, 1 Paige, 426). The foregoing sections of this article do not apply to a case, where an injunction order is applied for, to stay proceedings in another action, on the ground that a judgment, verdict, report, or decision therein, was obtained by actual fraud. In that case, the court or judge, granting the injunction order, may dispense with the deposit of money, or the execution of an undertaking, except as prescribed in the next section. (Co. Civ. Proc. § 619). The fraud, referred to in this section, is not merely a failure to perform the terms, or the conditions, upon which the judgment was rendered, but such fraud as a false representation, or other actual fraud. (*Cook v. Dickerson*, 2 Sandf. 691). Money paid into court, as prescribed in sections 612 and 613 of the code of civil procedure may be paid over, by the direction of the court, to the party whose proceedings are stayed, upon his giving an undertaking to the people of the state, with sufficient sureties, in a sum fixed by the court, to pay the money and interest, or any

part thereof, as directed in the order, or judgment of the court. (Co. Civ. Proc. § 614). Where money so paid into court, has been paid over to the party, whose proceedings are stayed, if the final decision of the action in which the injunction order is granted is against the party obtaining it, the court must give such directions as justice requires, with respect to canceling the undertaking, given by the successful party; making perpetual the injunction, staying collection of the judgment; and requiring the judgment to be discharged of record. (Co. Civ. Proc. § 615).

Sec. 2. Security in Other Cases.

Where special provision is not otherwise made by law, for the security to be given upon an injunction order, the party applying therefor, must give an undertaking, executed by him, or by one or more sureties, as the court or judge directs, to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding a sum specified in the undertaking, as he may sustain by reason of the injunction, if the court finally decides that the plaintiff was not entitled thereto. (Co. Civ. Proc. § 620). For the form, and mode of execution and approval of an undertaking given under this section, see chapter VIII, article IV, of this book. The undertaking must in all cases conform, in terms and substance, to the requirements of the code. (*Palmer v. Foley*, 71 N. Y. 106). It must be filed forthwith, and if not so filed, the opposite party shall be at liberty to move the court to vacate the proceedings, as if the undertaking had not been given. (General Rule 4). The omission to file the undertaking is a ground for vacating the injunction (*Johnson v. Casey*, 28 How. Pr. 492; 3 Robt. 710); but the court may in its discretion, allow the undertaking to be filed *nunc pro tunc*, on terms, or without terms (*O'Donnell v. McMurn*, 3 Abb. Pr. 391); and it may also do this upon appeal from the order. (*N. Y. Att. Pulv. Co. v. Van Tuyl*, 2 Hun, 373). If the security given is inadequate, it will be a ground for vacating the injunction, unless it is increased. (*Ryckman v. Coleman*, 21 How. Pr. 404). If the sureties

become insolvent, the court may order others to be substituted, in its discretion. (*Willett v. Stringer*, 15 How. Pr. 310; 6 Duer, 686). The undertaking cannot be canceled, without the knowledge and consent of the defendant. (*Dry Dock, East Bldg. & Batt. R. R. Co. v. Cunningham*, 45 How. Pr. 458).

Sec. 3. Security in Special Cases.

The foregoing provisions of this article do not affect any special statutory provision, whereby security upon granting an injunction order may be dispensed with, in a particular case, or the security to be given in a particular case is otherwise regulated. (Co. Civ. Proc. § 621). In actions relating to real property, if the defendant commits waste upon, or does any other damage to the property in controversy, the court may grant an injunction restraining him from the further commission upon, or damage to the property without security. (Co. Civ. Proc. § 1681). Security will not be required, in an action brought by the people of the state, or by a domestic municipal corporation, or by a public officer, in behalf of the people, or in behalf of such corporation, except where the law, which permits an injunction to be granted in such an action, especially directs that security shall be given. (Co. Civ. Proc. § 1990). No security is required of the board of health of the city of New York, in procuring an injunction. (Greater New York Charter, § 1260).

Sec. 4. New Undertaking on Motion to Vacate.

Upon the hearing of an application upon notice, to vacate or modify an injunction order, the court or judge may require a new undertaking in the same, or in a different sum to be given by the plaintiff, with the like sureties, and to the like effect, as upon granting an original order. The persons executing the new undertaking, become liable thereon, as if they had executed it upon the granting of the original order. The persons, who executed the original undertaking, remain liable thereon, until the new undertaking is given and approved, and no longer. Upon such hearing, the court

or judge may, where the alleged wrong or injury is not irreparable, and is capable of being adequately compensated for in money, vacate the injunction order, upon the defendant's executing an undertaking, in such form and amount, and with such sureties, as the court or judge shall direct, conditioned to indemnify the plaintiff against any loss sustained by reason of vacating such injunction order. (Co. Civ. Proc. § 629). If a stay of proceedings is granted, pending an appeal from an order dissolving the injunction, it is a new injunction and a new undertaking must be required, as the sureties on the old undertaking are discharged. (*Town of Guilford v. Cornell*, 4 Abb. Pr. 220; *Disbro v. Disbro*, 37 How. Pr. 147). The court will not vacate an injunction, upon the giving an undertaking, as it is permitted to do under section six hundred and twenty-nine, in any case except one which would call upon the court to vacate, or refuse to grant, a permanent injunction; where the legal right is plain and clear, and the violation of it is undoubted, the court will not vacate the injunction upon the giving of an undertaking, under this section. (*Thayer v. Roch. City & Bright. R. R. Co.*, 15 Abb. Pr. N. C. 52). In every case where the injunction is vacated, upon giving such an undertaking, the undertaking must comply strictly with the requirements of the code. (*Chamberlain v. B. N. Y. & P. R. R. Co.*, 31 Hun, 339).

ARTICLE VI.

DAMAGES SUSTAINED BY THE INJUNCTION.

SECTION.

1. Liability.
2. When the right accrues.
3. How the damages are ascertained.
4. What damages allowed.
5. Action on the undertaking.

Sec. 1. Liability.

The plaintiff is not liable for any damages, which arise to the defendant by reason of the injunction order, unless he has given an undertaking, or unless the cir-

cumstances are such that the defendant can maintain an action against him for a malicious prosecution. (*Mark v. Hyatt*, 135 N. Y. 306). In such case, as in all other cases for malicious prosecution, the fact of want of probable cause, and the existence of malice, should be alleged and proved. (High on Injunctions, § 1448). Unless these circumstances exist, the only liability of the plaintiff for the damages sustained by the injunction, arises from the giving of the undertaking. (*Palmer v. Foley*, 71 N. Y. 106).

Sec. 2. When the Right Accrues.

The right to damages does not accrue, until a final determination that the plaintiff is not entitled to the injunction. (*Benedict v. Benedict*, 76 N. Y. 600). Such a determination is usually reached by final judgment for the defendant, after trial. (*Lawton v. Green*, 64 N. Y. 326). Where the injunction has been vacated, and the action afterwards discontinued by the voluntary action of the plaintiff, whether *ex parte* or despite defendant's opposition, there is a final determination that the plaintiff is not entitled to the injunction, and the defendant is entitled to damages (*Pacific Mail S. S. Co. v. Toel*, 85 N. Y. 646; *Manning v. Cassidy*, 80 Hun, 127; *N. Y. C. & H. R. R. Co. v. Village of Hastings*, 9 App. Div. 256); so also where the complaint has been dismissed for failure to prosecute (*De Berard v. Priol*, 34 App. Div. 502); or there has been a judgment determining that the plaintiff was not entitled to the injunction entered upon a stipulation of the parties which provided for such a judgment in case the court of appeals held that the order for the preliminary injunction was erroneous. (*N. Y. Suburban Water Co. v. Bissell*, 78 Hun, 176); but not where the complaint was dismissed and the injunction vacated, as a punishment for plaintiff's contempt in interfering with the execution of a commission issued on defendant's application (*Apollinaris Co. v. Venable*, 136 N. Y. 46); nor where the action was discontinued, by stipulation of the parties (*Palmer v. Foley*, 71 N. Y. 106); nor where the action abates by the death of the defendant. (*Johnson v. Elwood*, 82

N. Y. 362). The mere fact that the temporary injunction has been dissolved on motion, does not operate as a final decision that the plaintiff was not entitled to the injunction. (*Neugent v. Swan*, 61 How. Pr. 40, 63; *N. Y. Sec. & Tr. Co. v. Lipmar*, 83 Hun, 569). Although the complaint has been dismissed, yet if the referee, upon dismissing the complaint, refused to decide that the plaintiff was not entitled to the injunction, the defendant has no right to damages by virtue of his undertaking. (*Kelley v. McMahon*, 32 Hun, 347). Any irregularity in prematurely obtaining the order of reference as to damages, may be waived by the consent of the parties (*Lawton v. Green*, 64 N. Y. 326); or by permitting the referee to proceed without objection; or, although the objection has been taken, if the party taking it does not withdraw from the reference. (*Roberts v. White*, 73 N. Y. 375). Where an appeal from a judgment for the defendant has been taken, an order of reference to ascertain the damages should not be granted until the final determination of the appeal. (*Musgrave v. Sherwood*, 76 N. Y. 194; *Howard v. Park*, 59 How. Pr. 344). Where an appeal has been taken to the court of appeals, a final decision is deemed to be had, when the remittitur is sent down to the court below. (*Ninth Av. R. R. Co. v. N. Y. Ele. R. R. Co.*, 3 Abb. N. C. 22).

Sec. 3. How the Damages are Ascertained.

The damages, sustained by reason of an injunction, may be ascertained and determined by the court, or by a referee, appointed by the court, or by a writ of inquiry, or otherwise, as the court shall direct; and the decision of the court thereupon, or an order confirming the report of the referee, is conclusive, as to the amount of those damages, upon all the persons who have executed the undertaking, unless it is reversed upon appeal. The court may, in its discretion, direct that the sureties have notice of the hearing, or of an appeal, and may prescribe the time and manner of giving them notice. (Co. Civ. Proc. § 623). A proceeding under this section, is not a proceeding in the action, but it is a proceeding after

judgment, and constitutes no part of the action. (*Lawton v. Green*, 64 N. Y. 326). An order of reference should authorize the referee only to find the amount of damages; it is improper to insert in it directions to the party to pay them, when they are ascertained. (*Id.*; *Harter v. Westcott*, 12 Misc. 180; *affd.* 155 N. Y. 211). An order of reference can be made only against those who sign the undertaking. (*Patterson v. Bloomer*, 9 Abb. Pr. N. S. 27). The plaintiff is not liable under it, unless he signs it. (*Leavitt v. Dabney*, 9 Abb. Pr. N. S. 373). The plaintiff is entitled to notice of all the proceedings under the order, and of the application for it. The notice of hearing under an order should be two days. (2 T. & S. Pr. 531, 632). The testimony of the witness should be signed, and the report of the referee should be filed with the testimony. (General Rule 30). Notice of filing the report should be given, and the report becomes absolute and stands as confirmed, unless exceptions are filed and served within eight days after the service of notice of filing. (General Rule 30). The plaintiff in all cases should have notice of the filing. In proceedings under the order of reference, great latitude is given to the court, as to the manner in which the referee shall proceed, or in which the testimony shall be taken; the proceedings are not necessarily governed by the strict rules which govern the trial of issues; the court may direct the evidence taken upon the trial to be submitted to the referee, or it may authorize *ex parte* affidavits to be read. (*Roberts v. White*, 73 N. Y. 375, 379). The report will not be confirmed unless the referee reports the damages, and not alone the facts from which the damages can be ascertained (*Taaks v. Schmidt*, 19 How. Pr. 413); but the referee is not required to report findings of fact and conclusions of law separately. (*Matthews v. Murchison*, 14 Abb. N. C. 512, note). The report must be confirmed by the court before any action can be taken on it, and the order of confirmation should only fix the amount of damages, but should not direct their payment. (*Lawton v. Green*, 64 N. Y. 326, 331). The report when confirmed, is conclusive upon the sureties, although

they were not parties to the reference, and had no notice of the proceedings. (*Meth. Churches of N. Y. v. Barker*, 18 N. Y. 463). The sureties may, however, appeal from the order if they have notice of the proceedings. (*Hotchkiss v. Platt*, 7 Hun, 56; *affd.* without op., 66 N. Y. 628). The order confirming the report is appealable to the court of appeals. (*Newton v. Russell*, 87 N. Y. 527; *Harter v. Westcott*, 155 N. Y. 211).

Sec. 4. What Damages Allowed.

The damages cannot, in any case, exceed the amount specified in the undertaking. The referee's fees and the disbursements in ascertaining the damages may be allowed, but all the damages together cannot exceed the amount specified in the undertaking. (*Lawton v. Green*, 64 N. Y. 326; *Pac. Mail S. S. Co. v. Toll*, 10 Wk. Dig. 269; *affd.* 85 N. Y. 646; *Holcomb v. Rice*, 119 N. Y. 598). The general term of the late court of common pleas for the city and county of New York held, subsequently to the cases cited, that the expenses of the reference might be directed to be paid by the plaintiff, in addition to the full amount of the undertaking assessed as damages (*O'Connor v. N. Y. & Yonkers Land Imp. Co.*, 8 Misc. 243); but the reasoning of the court, based upon supposed changes of the statute law by the adoption of the code of civil procedure (which became a law subsequent to the decision of *Lawton v. Green*, *supra*), is not sound. It has always been the rule that the expenses of the reference may be recovered, if the undertaking is large enough to cover both the damages and such expenses (*Aldrich v. Reynolds*, 1 Barb. Ch. 613); but, inasmuch as the only liability (except where a case of malicious prosecution is made out) is upon the undertaking (*Mark v. Hyatt*, 135 N. Y. 306), it is apprehended that the rule is still as laid down in *Lawton v. Green*, and that the amount of the undertaking is the limit of the recovery. Sections 3236 and 3251 of the code of civil procedure, providing for the allowance of the expenses of the reference under section 623, were not intended to, and do not, increase the liability of the plaintiff or sureties upon the under-

taking. Within this amount, the defendant is entitled to have damages to his business, or otherwise, which necessarily result from the injunction. (*Hovey v. Rubber Tip Pencil Co.*, 50 N. Y. 335). The depreciation of property which has been caused by the injunction, or the value of its use, if that has been lost, or the value of the rent of the property, while it has been kept out of his possession by the injunction, may be allowed as damages. (*Barton v. Fisk*, 30 N. Y. 166; *Bray v. Poillon*, 2 Hun, 383; *McDonald v. James*, 38 Super. 76). Where property went into the hands of a receiver as a direct result of the injunction, the loss of the property, or decrease of profits, or the increased expenses of care, over what would have necessarily been incurred if no receiver had been appointed, will be allowed. (*Hotchkiss v. Platt*, 8 Hun, 46). In actions of ejectment or dower, the damages to be paid upon vacating the injunction order, or upon the decision of the action against the party obtaining it, include not only reasonable rents and profits of the real property recovered by the verdict, report, or decision, but all waste committed upon the property after granting the injunction. (Co. Civ. Proc. § 617). General counsel fees on the trial are not allowed, unless they were incurred solely in consequence of the injunction. (*Newton v. Russell*, 87 N. Y. 527; *Phoenix Bridge Co. v. Keystone Bridge Co.*, 10 App. Div. 176; *affd. on op. below*, 153 N. Y. 644). Counsel fees incurred in procuring the dissolution of the injunction are allowed. (*Id.*). But no counsel fees are allowed of an unsuccessful attempt to dissolve it. (*Randall v. Carpenter*, 88 N. Y. 293). The fees of counsel on the reference to assess the damages may also be allowed as damages. (*Newton v. Russell*, 87 N. Y. 527). Counsel fees are to be measured not only by the time employed, but by the magnitude of the interests involved. (*Matthews v. Murchison*, 14 Abb. N. C. 512, note). The counsel fees allowed upon this reference may be such as could not be included in the taxable costs. (*Coates v. Coates*, 1 Duer, 664). Counsel fees will be allowed, although they have not actually been paid, if they are reasonable, and they have actually been in-

curred, so that the defendant is liable for them. (*Crounse v. Syr. Chen. & N. Y. R. R. Co.*, 32 Hun, 497; affd. without op., 97 N. Y. 631). In a case where it was absolutely essential for the defendant to move at once to vacate the injunction, and it was necessary for him to incur large expenses to go to the only court where the motion could be made, the expenses which were actually incurred were allowed. (*Crounse v. Syr. Chen. & N. Y. R. R. Co.*, *supra*). Where the defendant enjoined was an officer of a corporation, or joint stock association, or a bailee, agent, trustee, or other representative of another, and the damages sustained by him, are less than the sum specified in the undertaking, the court or the referee may also separately ascertain and . . . determine the damages, sustained by reason of the injunction, by the corporation, association, or person, whom the defendant represents, to an amount not exceeding the surplus of the sum specified in the undertaking; and those damages may be recovered in separate action, brought as prescribed in the next section. (Co. Civ. Proc. § 624).

Sec. 5. Action on the Undertaking.

Where the damages have been ascertained by the decision of the court, or the confirmation of a referee's report, as prescribed in sections six hundred and twenty-three and six hundred and twenty-four, any person, entitled to the benefit of an undertaking, executed pursuant to the provisions of this title, may bring an action thereon, without further leave of the court. (Co. Civ. Proc. § 625). The sureties cannot be compelled to pay the damages without an action. (*Troxell v. Haynes*, 16 Abb. Pr. N. S. 1; *Lawton v. Green*, 64 N. Y. 326). The amount fixed by the referee's report is the measure of damages, in an action on the undertaking. (*Randall v. Carpenter*, 47 Super. 205).

ARTICLE VII.

VACATING OR MODIFYING THE ORDER.

SECTION.

1. Without notice.
2. Upon notice.
3. Vacating injunction upon undertaking by defendant.

Sec. 1. Without Notice.

Where the injunction order was granted without notice, the party enjoined may apply, upon the papers upon which it was granted, for an order vacating or modifying the injunction order. Such an application may be made, without notice, to the judge or justice who granted the order, or who held the term of court where it was granted; or to a term of the appellate division of the supreme court. It cannot be made without notice, to any other judge or justice or term, unless the applicant produces proof, by affidavit, that, by reason of the absence or other disability of the judge or justice who granted the order, the application cannot be made to him; and that the applicant will be exposed to great injury, by the delay required for an application upon notice. The affidavit must be filed with the clerk; and a copy thereof, and of the order vacating or modifying the injunction order, must be served upon the plaintiff's attorney, before that order takes effect. (Co. Civ. Proc. § 626). A party may move to vacate the order for irregularity, although he is in contempt. (*Matter of Steinert*, 24 Hun, 246). The application under this section is to be made *ex parte*, and on the papers on which the notice is granted; notice of the hearing is not contemplated. (*Coffin v. Prospect Park & C. I. R. R. Co.*, 61 How. Pr. 105). The injunction will only be vacated *ex parte*, where that course is necessary to guard against serious loss, arising from the necessity of delay in giving notice. Where the application was not made until a year after the injunction had been granted, the court held that it was not proper to vacate it *ex parte*. The court upon such an application must act with great caution. (*Peck v. Yorks*, 41 Barb. 547). The appellate divis-

ion will only entertain an application, to vacate an injunction under this section, where some pressing necessity and special reason exists. (*Matter of Barkley*, 42 App. Div. 597; app. dismissed, 161 N. Y. 647). The reasons for exercising the exceptional power given to that court must be more than the alleged error of the court below, and more than the magnitude of the interests involved. There must be peculiar circumstances which almost compel immediate action. (*Gere v. N. Y. C. & H. R. R. Co.*, 38 Hun, 231).

Sec. 2. Upon Notice.

Where the injunction order was granted without notice, or where it was granted upon notice, with leave to apply to vacate or modify it, the party enjoined may apply upon notice, to the judge who granted it, or to the court, at a term where a contested motion in the action may be heard, for an order, vacating or modifying the injunction order. Such an application may be founded upon the papers upon which the injunction was granted; or upon proof, by affidavit, on the part of the defendant, or both. Where it is founded upon proof on the part of the defendant, it may be opposed by new proof, by affidavit, on the part of the plaintiff, tending to sustain the injunction. (Co. Civ. Proc. § 627). Any person affected by the order so that he is embarrassed in his business, or in any way injured by it, may move to vacate it, although he is not in terms restrained by it. (*Landers v. Fisher*, 24 Hun, 648). If the motion is made on the same papers on which the injunction was granted, no proof is required on the part of the party moving. (*Newbury v. Newbury*, 6 How. Pr. 182). Where the motion is made on those papers only, the plaintiff cannot read new proof to sustain the injunction. (*Steuben Co. Bank v. Alberger*, 75 N. Y. 179). If the verified complaint was before the judge, when the injunction was granted, it may be referred to by the plaintiff on the motion which is made on the papers, although it is not referred to in the injunction. (*Turner v. Thompson*, 2 Abb. Pr. 444). The granting or denial of an application, made as prescribed in section six hundred and

twenty-seven, founded only upon the papers upon which the injunction order was granted, does not prejudice a subsequent application, seasonably made, founded upon proof by affidavit, on the part of the defendant. And the granting or denial of either application does not prejudice a subsequent application, seasonably made, founded upon the failure of a complaint, which had not been made at the time of the former application, to set forth a cause of action, sufficient to entitle the plaintiff to the injunction order, upon one or more grounds, recited therein. (Co. Civ. Proc. § 628). Where the injunction is granted with an order to show cause, and on the return of the order the injunction is continued, the motion under this section may still be made at special term. (*Galusha v. Flower City Nat. Bk.* 1 Hun, 573). Upon the hearing of a motion to vacate the injunction, the verified answer has only the effect of an affidavit. (Co. Civ. Proc. § 630). The rule, before the adoption of the code of civil procedure, was that where all the equities of the complaint were denied by the answer, the injunction would be vacated upon motion; section 630 seems to have removed the reason for this rule, and it is apprehended that the injunction may be continued where the plaintiff's right to the ultimate relief sought is clearly established, although the answer denies all the allegations of the complaint. (*Warsaw Waterworks Co. v. Warsaw*, 4 App. Div. 509; *R. W. & O. T. R. R. Co., v. City of Rochester*, 46 Hun, 149; *McEncroe v. Decker*, 58 How. Pr. 250); it is well to note, however, that the opposite view has been held, and seems to be the rule in the first department. (*Kuntz v. The C. C. White Co.*, 29 N. Y. St. Rep. 366; see also *Davis v. Zimmerman*, 91 Hun, 489, and *Oppenheimer v. Hirsch*, 5 App. Div. 232). Where all the material equities are disproved by the defendant the injunction should be dissolved. (*Central Cross Town R. R. Co. v. The Blecker St. & Fult. Ferry R. R. Co.*, 49 How. Pr. 233). If the case shows that there is apparent necessity for immediate relief by injunction, to prevent irreparable damage, the court will sometimes refuse to vacate it, although the material facts are denied; especially where no damage

can result to the defendants from its continuance. (*Carpenter v. Danforth*, 19 Abb. Pr. 225). The injunction should be dissolved, if the court on all the evidence would not have granted it in the first instance. (*Moser v. Polhamus*, 4 Abb. Pr. N. S. 442). If there is any doubt whether or not the plaintiff is entitled to the injunction, the defendant, and not the plaintiff, is to have the benefit of it. (*Secor v. Weed*, 7 Robt. 67). The court will sometimes dissolve the injunction for formal defects in the papers; though if the papers were in proper form, the injunction would be permitted to stand. In the case of *Johnson v. Casey* (28 How. Pr. 492), the injunction was dissolved, because the papers were so illegibly written that they could not be deciphered. Where the defendant makes a case for the dissolution of the injunction, it will not be denied merely upon the ground of expediency. (*Taylor v. Hutton*, 43 Barb. 195). The injunction order will not be vacated because it was irregularly served; the remedy in such a case is to set aside the service. (*Phoenix Foundry Co. v. North Riv. Constr. Co.*, 6 Civ. Proc. Rep. 106). That there is a defect of parties defendant is sometimes a ground for a dissolution of the injunction, but not necessarily, or usually. (*Schulten v. Lord*, 4 E. D. Smith, 206). A plea of the statute of limitations affords no ground for setting aside an injunction. (*Littlejohn v. Leffingwell*, 40 App. Div. 13). If the action has been discontinued and the costs paid, the court will not hear a motion to vacate the injunction, for the mere purpose of deciding whether the plaintiff had a right to it, so that he may procure an order of reference to fix the amount of damages. (*Hope v. Acker*, 7 Abb. Pr. 308). If the injunction is withdrawn, a motion to vacate it is unnecessary. (*Shearman v. N. Y. C. Mills*, 11 How. Pr. 269); but the defendant may enter an order dissolving the injunction as of course, upon the stipulation vacating it. An irregularity in obtaining the injunction is not waived by a motion to dissolve it upon any other ground. (*Wilkie v. Roch. & St. Line R. R. Co.*, 5 Wk. Dig. 352).

Sec. 3. Vacating Injunction upon Undertaking by Defendant.

The provisions of section six hundred and twenty-nine, that the court or judge may, where the alleged wrong or injury is not irreparable, and is capable of being adequately compensated for in money, vacate the injunction order upon defendant's executing an undertaking, as it was first inserted in the code, was compulsory, and directed that the judge must vacate the injunction upon execution of the undertaking, but the word "must" was changed to the word "may," by an amendment passed in May, 1884. This section of the code is very strictly construed by the courts and, as we have seen in a previous section, the court will take action under it, only in a case where the legal rights of the parties are doubtful. Where a dissolution of the temporary injunction, leaves the plaintiff without protection until his rights are established by a judgment, it might work injustice to him, by giving him no remedy for injuries that he would be likely to suffer during the pendency of the suit, except a judgment for damages against an irresponsible defendant; and it is only in such cases that the court will exercise the power given to it by this section. (*Thayer v. Roch. Co. etc., R. R. Co.* 15 Abb. N. C. 52).

Where the act which was restrained, was the withholding of a sum payable on a lease and the substitution of a less sum, it is capable of money compensation, and the injunction will be dissolved on giving an undertaking under this section. (*Met. El. R. R. Co. v. Manhat. El. R. R. Co.*, 11 Daly, 367). In all cases the undertaking must be in strict compliance with the statutes, as we have seen. (*Chamberlain v. The B. & N. Y. & P. R. R. Co.*, 31 Hun, 339).

ARTICLE VIII.

EFFECT OF SUBSEQUENT PROCEEDINGS IN THE ACTION.

A dissolution of the temporary injunction does not necessarily prevent the plaintiff from obtaining a perpetual injunction upon the trial of the action. (*Banks v. American Tract Society*, 4 Sandf. Ch. 438). An injunction until the further order of the court, is merged in the final judgment. (*Gardner v. Gardner*, 87 N. Y. 14). Where an appeal has been taken from an order denying an injunction, the court will not usually continue the injunction upon the appeal. The court has no power, after a judgment against the plaintiff, to grant an injunction or to revive or to continue, during the appeal, a temporary injunction previously obtained. (*Spears v. Matthews*, 66 N. Y. 127; *Carpenter v. Fisher*, 18 App. Div. 561). A stay of proceedings upon an appeal from a judgment, does not annul the judgment, or affect in any way the injunction, and the defendant is not absolved from the duty of obedience, or permitted to do that which the judgment prohibits. (*Sixth Av. R. R. Co. v. Glibert Ele. R. R. Co.*, 71 N. Y. 430). Where a temporary injunction has been granted by the court upon conflicting affidavits, and the party enjoined appeals to the appellate division, instead of bringing the cause promptly on for trial, the discretion of the special term will not be reversed except in a clear case. (*Davis v. Rosenstein*, 56 App. Div. 220). Where the special term has denied an injunction, and the general term has reversed the judgment and ordered a new trial, the action of the general term does not reinstate the injunction, which has been dissolved by the judgment of the special term, but the court will reinstate it on motion as to everything which is still executory. (*Hatch v. West. Un. Tel. Co.*, N. Y. Daily Reg. Dec. 20, 1882). Where a cause, commenced in one of the courts of the state, has been removed to the circuit court of the United States, an injunction, which has been granted before the removal, is not affected by it but still continues in force. (U. S. Rev. Stats. § 446).

CHAPTER XVI.

ATTACHMENT.

ARTICLE I. . . . When and by whom it may be granted.

ARTICLE II. . . . Papers on which it may be granted.

ARTICLE III. . . . Execution of the warrant.

ARTICLE IV. . . . Vacating and modifying the warrant.

ARTICLE V. . . . Regulations where there are two or more warrants
against the same defendant.

ARTICLE VI. . . . Proceedings after judgment.

ARTICLE VII. . . . Proceedings after warrant has been vacated, or
attachment discharged.

ARTICLE I.

WHEN AND BY WHOM IT MAY BE GRANTED.

SECTION.

1. Who may sue out an attachment.
2. In what actions it may be granted.
3. Against whom it may be granted.
4. When an attachment will be granted.
5. By whom granted.

Sec. 1. Who may Sue out an Attachment.

Any person, who may come into the courts of this state to pursue a remedy, which is given by our statutes, may enforce that remedy to the same extent, and in the same manner, as a citizen of the state; and any such person has the same right to sue out a warrant of attachment as is given to a citizen of this state. (*Hibernia National Bank v. Lacombe*, 84 N. Y. 367). Following this rule, it has been held that a non-resident of the state may sue out an attachment, in any court of the state which has authority to grant it, in any action that he may bring (*Ready v. Stewart*, 1 Co. Rep., N. S. 297; *Farquhar v. Wisconsin Condensed Milk Co.*, 30

Misc. 270); even though his action may be brought against a non-resident defendant. (*Cooke v. Appleton*, 51 Super. 529). A foreign corporation, or a non-resident, however, can neither maintain an action nor have a warrant of attachment against a foreign corporation, except in the cases specified in section seventeen hundred and eighty of the code of civil procedure (*Peo. v. St. Nicholas Bk.*, 44 App. Div. 313); but wherever a cause of action, in which an attachment may be sued out, exists in favor of a non-resident, he may assign it to a resident of the state, by whom a warrant of attachment can be procured. (*McBride v. Farmers' Bank*, 26 N. Y. 450). Where the plaintiffs are members of a firm doing business in this state, it is not necessary that all of them should reside in the state, to entitle them to an attachment against a non-resident; it is sufficient if one of them is a resident. (*Renard v. Hargous*, 13 N. Y. 259).

Sec. 2. In What Actions it may be Granted.

A warrant of attachment, against the property of one or more defendants in an action, may be granted upon the application of the plaintiff, as specified in section six hundred and thirty-six of the code of civil procedure, where the action is to recover a sum of money only, as damages for one or more of the following causes:

1. Breach of contract, express or implied, other than a contract to marry.
2. Wrongful conversion of personal property.
3. An injury to person or property in consequence of negligence, fraud, or other wrongful act. (Co. Civ. Proc. § 635).

To entitle the plaintiff to an attachment, there must be an actual existing cause of action at the time the application is made. (Co. Civ. Proc. § 636). There is now no other mode of procuring an attachment under our statutes, than that prescribed in the code of civil procedure; for those portions of the revised statutes which authorized an attachment, and that part of the non-imprisonment act which provided for an attachment in certain cases, have been repealed, leaving the

code of civil procedure the only statute by which this remedy is given. There is no little difference between applications for attachments against non-resident debtors under the revised statutes, and under the non-imprisonment act of 1831, and applications under the code. The attachments, issued under the two former laws were special proceedings. They were the original processes by which the suits were commenced, and a strict compliance with the requirements of the acts under which the proceedings were had, was held to be necessary to confer jurisdiction; and if the affidavits failed to state the facts necessary to confer jurisdiction, the whole proceedings were extra-judicial and void; and the defect could not be supplied by amendment, or by supplemental affidavits. But an application under the code, on the contrary, is not an original process, nor is it the commencement of the action (Co. Civ. Proc. § 416; *Stone v. Pratt*, 90 Hun, 39), nor can a judgment be obtained upon it alone; but it is simply a provisional remedy, adopted, under certain circumstances, in a suit which is already commenced, or which is about to be commenced, at the time of the granting of the remedy; and the application for the remedy is regarded as a motion in the action (*Allen v. Meyer*, 73 N. Y. 1); and for this reason, if the action is one in which the law permits an attachment to be issued, the jurisdiction of the court over the action and the parties thereto does not depend on the sufficiency of the affidavits, which are presented to the court, on the application for the attachment. (*Furman v. Walter*, 13 How. Pr. 348; *Skinner v. Stuart*, 39 Barb. 206; *Lamkin v. Douglass*, 27 Hun, 517). The granting of an attachment under the code, operates for the sole benefit of the attaching creditor, and not for the whole body of creditors of the defendant, as was the case under the revised statutes. (*Ready v. Stewart*, 1 Co. Rep., N. S. 297; *Mechanics & Traders' Bank v. Dakin*, 50 Barb. 587; reversed on another point, 51 N. Y. 519). The right to an attachment, having been conferred by a statute, is limited by its provisions; and the plaintiffs must bring the case within the authority of the statute, and show that

their proceedings conform to it. (*Blossom v. Estes*, 84 N. Y. 614). An attachment cannot be demanded as a matter of right, even in the actions in which it is given by the code; but it is, in all cases, discretionary with the court. This discretion, however, is a judicial discretion, as it is called, and the exercise of it can be reviewed by the appellate division (*Haebler v. Bernharth*, 115 N. Y. 459); but it is not reviewable by the court of appeals (*Sartwell v. Field*, 68 N. Y. 341); and the only question before the court of appeals is one of jurisdiction (*Wenzell v. Morrissey*, 115 N. Y. 665), unless a question touching discretion is certified to that court. (*Penoyar v. Kelsey*, 150 N. Y. 77). In actions for a breach of contract, an attachment may issue, although the suit is for unliquidated damages, wherever a proper disclosure of the grounds of the claim furnishes the means of ascertaining the amount to which the plaintiff may be entitled. (*Manton v. Poole*, 67 Barb. 330; *affd.* 5 Hun, vi; *Clews v. Rockford R. I. & St. L. R. R. Co.*, 2 Hun, 379; *Westervelt v. Agrumaria etc. Societa*, 58 Hun, 147). An action by the United States for unpaid duty, is an action upon an implied contract, and an attachment may be granted in it (*United States v. Graff*, 67 Barb. 304); so is an action to enforce a contract for a sale of personal property, and for the money due upon it. (*Corson v. Ball*, 47 Barb. 452). A foreign judgment is an implied contract under this section, whether such judgment was recovered upon a contract or for a tort. (*Gutta Percha etc. Mfg. Co. v. The Mayor etc. of Houston*, 108 N. Y. 276). It was held in *Remington Paper Co. v. O'Dougherty* (32 Hun, 255; *affd.* without opinion, 96 N. Y. 666). that an action brought under section 3247 of the code of civil procedure to recover the costs of a former action which was prosecuted by the defendant in the case cited in the name of a third person for the said defendant's benefit, was not an action upon a contract. As was well pointed out by Mr. Justice Barrett in a dissenting opinion in the case of *Augner v. Mayor* (14 App. Div. 461, 467), it is difficult to see any distinction in kind between the two liabilities, and it is appre-

hended that the *Remington Paper Co.* case may now be regarded as overruled. In the *Augner* case a liability to repay license money, imposed by statute, was held to be an implied contract. Breach of warranty, express or implied, is a "breach of contract" within the meaning of the section. (*Haebler v. Bernharth*, 115 N. Y. 459; *Cunningham v. Von Pustan*, 31 N. Y. St. Rep. 255). An attachment may be had in an action brought to recover arrears of alimony directed by a decree of divorce, to be paid. (*Grevell v. Whiteman*, 32 Misc. 279). In an action for the price of goods sold, an attachment may be granted under the first subdivision of section six hundred and thirty-five, although it is alleged in the complaint, that the plaintiff's were induced to sell the goods by fraudulent representations of the defendant. (*Gladke v. Maschke*, 35 Hun, 476; *Morrison v. Watson*, 23 Wk. Dig. 286; *Whitney v. Hirsch*, 39 Hun, 325). The case of *Wittner v. Von Minden* (27 Hun, 234), which holds to the contrary, is overruled. Where a laborer acquired a mechanic's lien upon certain property which the plaintiffs had bought, and it appeared that the plaintiffs had paid the laborer's claim to prevent a forced sale, it was held that the purchasers, being subrogated to the laborer's right of action against the former owner could maintain an action of contract against the latter and have an attachment therein. (*Alford v. Cobb*, 28 Hun, 22; S. C. 15 Wk. Dig. 557). An injury to property is any actionable act, whereby the estate of another is lessened, other than a personal injury or a breach of contract. (Co. Civ. Proc. § 3343, subd. 10). One who has been induced to make advances on the faith of forged paper, has sustained an injury to personal property, and is entitled to an attachment under the third subdivision of this section. (*Bogart v. Dart*, 25 Hun, 395). So an action to recover damages sustained by reason of the giving of credit, induced by false representations, is an "injury to property" (*Campion Card & Paper Co. v. Searing*, 47 Hun, 237; *Benedict v. Guardian Trust Co.*, 58 App. Div. 302); or an action to recover damages for the purchase of worthless shares, induced by fraudulent repre-

sentations. (*Stewart v. Lyman*, 62 App. Div. 182). It has been decided that an attachment cannot be granted in an action for equitable relief (*Thorington v. Merrick*, 101 N. Y. 5); and it was formerly held that an attachment could not be granted in an action for a personal injury (*Saddlescene v. Arms*, 32 How. Pr. 280), but, by the amendment of 1895, an action to recover damages for an injury to the person was added to the enumeration, in section 635, of actions in which an attachment could be granted, a "personal injury" being declared by section 3343, subdivision 9, of the code of civil procedure to include libel, slander, criminal conversation, seduction and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person, either of the plaintiff or of another. Alienation of one's husband's affection is an injury to the person. (*Rouge v. Rouge*, 15 Misc. 36). An attachment cannot be granted in any action, where the complaint contains several causes of action, upon some of which an attachment could not be issued. (*Union Con. Min. Co. v. Raht*, 9 Hun, 208). An action upon a statute for a penalty, is not an action upon an implied contract within subdivision one, so that an attachment can be issued. (*Wilson v. Harvey*, 52 How. Pr. 126). Where the plaintiff shows himself merely entitled to nominal damages, the court will not grant an attachment; although the action is one of those mentioned in section six hundred and thirty-five of the code of civil procedure. (*Walts v. Nichols*, 32 Hun, 276; *Westervelt v. Agrumaria, etc. Societa*, 58 Hun, 147). It will be noticed that the provisions of section six hundred and thirty-five of the code of civil procedure are more comprehensive than those of the code of procedure, upon the subject of attachment; and that the new code to some extent, increases the number of actions in which an attachment may be issued. Many of the decisions made upon this subject, under the code of procedure, have, therefore, become obsolete.

Sec. 3. Against Whom it May Be Granted.**Subdivision 1.—AGAINST A NON-RESIDENT.**

Where the defendant is a non-resident a warrant of attachment may be issued against him. (Co. Civ. Proc. § 636, subd. 2.) Actual cessation to dwell within the state for an uncertain period, without a definite intention as to any fixed time of returning, even though a general intention to return at some future time may exist, constitutes non-residence, and warrants the issuance of an attachment, under the code of civil procedure. (*Weitkamp v. Lochr*, 53 Super. 79). If the debtor resides in another state, although he has his place of business in this state, he is a non-resident, and an attachment may be granted against him. (*Wallace v. Castle*, 68 N. Y. 370). One who has his home with his family, living out of the state, where he frequently visits them, is a non-resident, although he has lodgings, and boards at his place of business, which is within this state. (*Murphy v. Baldwin*, 11 Abb. Pr. N. S. 407). The question is one of residence, not domicile. (*Hanover Nat. Bk. v. Stebbins*, 69 Hun, 308). An attachment may be granted against a foreign administrator, upon a contract made by him personally; but in such an action the court will not permit the warrant to be levied upon assets of the estate. (*Murphy v. Hall*, 38 Hun, 528). An attachment will not issue against a foreign administrator or executor, for a demand against a testator's estate, nor in any case, except where he is personally liable upon the cause of action. (*Matter of Hurd*, 9 Wend. 465; *Matter of Galloway*, 21 Wend. 32). The plaintiff in an action against a foreign receiver is not entitled to an attachment. (*Killmer v. Hobart*, 8 Abb. N. C. 426). Where an action is against a firm doing business in another state, but one of the members of which is a resident of this state, the plaintiff is not entitled to an attachment against the resident partner (*McKinlay v. Fowler*, 1 How. Pr. N. S. 282); so, also, proof that one member of the defendant partnership has absconded does not justify the granting of a warrant against the firm property. (*Bogart v. Dart*, 25 Hun, 395).

Subdivision 2.—AGAINST A FOREIGN CORPORATION.

The plaintiff in an action against a foreign corporation, is entitled to an attachment. (Co. Civ. Proc. § 636, subd. 2). A "foreign corporation" is defined as being every corporation other than one created by or under the laws of the state; or located in the state, and created by or under the laws of the United States, or by or pursuant to the laws in force in the colony of New York, before the 19th day of April, in the year 1775. (Co. Civ. Proc. § 3343, subd. 18). The latest expression of judicial opinion on the subject is to the effect that section 5242 of the United States Revised Statutes prohibits an attachment against national banks, whether solvent or insolvent. (*Van Reed v. People's Nat. Bk.*, 73 N. Y. Supp. 514). It is to be noted, however, that, so far as solvent national banks are concerned, this is a *dictum* only and contrary to the doctrine laid down in *Robinson v. Bank* (81 N. Y. 385). Moreover, two justices dissented from the decision in the *Van Reed* case.

Subdivision 3.—AGAINST ABSCONDING OR CONCEALED DEBTORS.

The plaintiff is entitled to an attachment, where the defendant is a natural person, and a resident of this state, who has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein, with the like intent. (Co. Civ. Proc. § 636, subd. 2). It is not necessary, to entitle the plaintiff to this relief, that the departure should be secret; the plaintiff will be entitled to his attachment if the departure be open, if it appears that the defendant has gone away with intent to defraud his creditors, or to avoid service of process. (*Morgan v. Avery*, 7 Barb. 656; *Hertz v. Stuart*, 3 Wk. Dig. 332). Slight circumstances are sufficient to establish that such is the intent with which the departure has been made. The court is not required to weary itself to find excuses for a fugitive from debt. The question of insolvency, although of great importance, is not controlling. If a

perfectly solvent man departs the state, with intent to defraud his creditors, or to avoid service of process upon him, his property may be attached. (*Schoonmaker v. Spencer*, 54 N. Y. 366, 372). But the facts must show that the defendant himself, against whom the process is sought, has done the act which is prescribed by the code; the fact that a partner has absconded, will not entitle the plaintiff to an attachment against the property of the firm, unless it appears that all the partners have absconded with the intent specified in the statute. (*Bogart v. Dart*, 25 Hun, 395; *Leach v. Cook*, 10 Vt. 239). Proof that one of the partners has absconded, will entitle the plaintiff to an attachment against the property of that one. (*Buckingham v. Swezy*, 25 Hun, 84). It must appear that the debtor has absconded with intent to avoid the service of a summons; it is not sufficient to entitle the plaintiff to an attachment, where it appears that he keeps concealed with intent to avoid the service of criminal process *Lynde v. Montgomery*, 15 Wend. 461; *Thames & Mersey Mar. Ins. Co. v. Dimick*, 22 N. Y. Supp. 1096); nor is proof of mere absence from his place of business adequate. (*Head v. Wollner*, 53 Hun, 615). Where it appears that the defendant is absent from his usual residence and place of business during business hours, when he is about to fail, or soon after a demand has been made upon him for a debt, and he refuses to reveal his place of resort, it sufficiently appears that he keeps himself concealed with intent to avoid service of a summons. (*Buell v. Van Camp*, 119 N. Y. 160; *Easton v. Malavazi*, 7 Daly, 147; *Genin v. Tompkins*, 12 Barb. 265). To entitle the plaintiff to an attachment under this provision of the code, it need not appear whether the debtor has left the state, or is concealed within it; if it is made to appear that he is not in his usual place of resort and cannot be found, and his place of abode is concealed, or cannot be discovered, and circumstances are shown from which it can be inferred that his intent is, either to avoid the service of a summons upon him, or to defraud his creditors, the requirements of the statute are satisfied, and the plaintiff will be entitled to his attachment.

It is not necessary that the creditor should state his case in either aspect, but he may state it in the alternative. (*Van Alstyne v. Erwine*, 11 N. Y. 331, 339; *Kneeland on Attachments*, §§ 215, 216). The length of time during which the defendant has kept concealed is not material, if the intent sufficiently appear. (*Genin v. Tompkins*, 12 Barb. 265).

Subdivision 4.—AGAINST ONE REMOVING, ASSIGNING OR SECRETING PROPERTY.

An attachment may be granted, either against a natural person, or a domestic corporation, upon the ground that the defendant has removed, or is about to remove property from the state, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property, with intent to defraud his creditors. (Co. Civ. Proc. § 636, subd. 2). It is important to notice that, under the phraseology of this portion of the section, it is immaterial what *method* the debtor adopts to dispose of his property; a sale, a confession of judgment, an assignment, a deed, are all “dispositions” of his property within the meaning of the section. It is material, however, in this case, as in the case mentioned in the former subdivision, that the intent should appear. (*Hertz v. Stuart*, 3 Wk. Dig. 332). It is not sufficient to show in the alternative, that the defendant “has assigned and disposed of, or is about to assign or dispose of” his property with intent to defraud creditors; such a disjunctive statement shows nothing. (*Cronin v. Crooks*, 143 N. Y. 352). The statement of the two grounds in the conjunctive may, also, be inadequate, where the grounds are inconsistent (*Johnson v. Buckel*, 65 Hun, 601; S. C. 20 N. Y. Supp. 566; *Hale v. Prote*, 75 Hun, 13), unless it clearly appears that there are two distinct acts charged. (*Jurgens v. Tum Suden*, 32 App. Div. 1). The facts showing the intent must be stated; the allegation of the conclusion is insufficient. (*Salzberg v. Mandelbaum*, 89 Hun, 497). The property which is removed or secreted must be the property of the defendant; the fact that the defendant has disposed of the

property of the plaintiff, or of a third person, with intent to defraud that person, is not a reason for an attachment against him. (*German Bank of London v. Dash*, 60 How. Pr. 124). It has been held, that threatening to make an assignment with preferences, is not alone evidence of an intent to dispose of property with intent to defraud creditors (*Wilson v. Britton*, 26 Barb. 562); but one cannot use the power of assigning property with a preference, so as to intimidate creditors into refraining from proceeding to collect debts, without running the risk of being chargeable with an intent to defraud them (*Gasherie v. Apple*, 14 Abb. Pr. 64); and a confession of judgment, made to force a settlement, is in the same category. (*Galle v. Tode*, 60 Hun, 132); it has, likewise, been held that the threat to use (with the help of the mortgagee) an unfiled chattel mortgage so as to prevent creditors from reaching any of the property is sufficient evidence (*Lulkens Iron, etc. Co. v. Payne*, 13 App. Div. 11); such a threat, or act, raises a suspicion of a fraudulent purpose, and if it is accompanied with slight circumstances showing a fraudulent intent, it will be sufficient to uphold an attachment (*Anthony v. Stype*, 19 Hun, 265); as where a debtor states that the object of the assignment would be that the plaintiff would get nothing (*Livermore v. Rhodes*, 3 Robt. 626); but the fact that the debtor has agreed to give a preference to another than the plaintiff, in case he becomes insolvent, does not raise a suspicion of fraudulent intent, so as to warrant the granting of an attachment against him. (*National Park Bank v. Whitmore*, 104 N. Y. 297, 302). So the actual payment of debts, the effect of which is to give preferences does not show an intent to defraud. (*Wallabout Bank v. Military Club*, 36 App. Div. 156). The plaintiff will not be entitled to an attachment against an assignor, upon the ground mentioned in this subdivision, for the reason that he has made a general assignment, which is void by reason of improper provisions in it (*Milliken v. Dart*, 26 Hun, 24); but if the assignment is fraudulent in fact, by reason either of the acts of the defendant in making it, or in the preparations for it, such fraud would

be sufficient to entitle him to an attachment. (*Vietor v. Henlein*, 34 Hun, 562; *Buhl v. Ball*, 41 Hun, 61; appeal dismissed, 106 N. Y. 672; *Friend v. Michaelis*, 15 Abb. N. C. 354). So the payment of an honest debt by a limited partnership, while insolvent, does not show an intent to defraud creditors, although such payment is in violation of a statute of another state (under the laws of which the partnership was organized) declaring such a transfer void. (*Casola v. Vasquez*, 147 N. Y. 258). It is not necessary, to warrant an attachment under this subdivision, that the defendant has disposed, or is about to dispose, of all his property; if he disposes of a part of his property (*Hyman v. Kapp*, 22 Wk. Dig. 310), with the intent to defraud one creditor (*Wildman v. Gelder*, 21 Civ. Proc. Rep. 143); or of any property in his possession, or to which he claims the title, although his title is imperfect or bad (*Treadwell v. Lawlor*, 15 How. Pr. 8); or if he disposes of a portion of his property in another state (*Kibbe v. Wetmore*, 31 Hun, 424); it is sufficient to warrant the issuing of an attachment against him. But a plaintiff, applying for an attachment under this subdivision, is called upon to act with promptness; and where the fraudulent disposition occurred several years before an action is brought, the plaintiff must show a satisfactory excuse for his delay, or a very clear case of fraud before an attachment will be granted. (*Allen v. Herschorn*, 9 Abb. Pr. N. S. 80).

Subdivision 5.—AGAINST ONE MAKING FALSE STATEMENT
IN WRITING, AS TO HIS FINANCIAL RESPONSIBILITY.

An attachment may also be granted, where, for the purpose of procuring credit, or the extension of credit, the defendant has made a false statement in writing, under his own hand or signature, or under the hand or signature of a duly authorized agent, made with his knowledge and acquiescence, as to his financial responsibility or standing. (Co. Civ. Proc. § 636, subd. 2). A warrant of attachment, against the property of one or more defendants in an action, may also be granted in an action in favor of a private person or corporation, brought to recover damages for an injury to personal

property where the liability arose in whole or in part, in consequence of the false statements of the defendant as to his responsibility or credit, in writing, under the hand or signature of the defendant or his authorized agent, made with his knowledge and acquiescence. In order to entitle the plaintiff to a warrant of attachment, in the case specified in this section, he must show, by affidavit, to the satisfaction of the judge granting it, that a sufficient cause of action exists against the defendant for a sum stated in the affidavit. (Co. Civ. Proc. § 637).

Both of these provisions were added to the code of civil procedure by chapter 736, of the laws of 1894, and there seems to have been very little litigation concerning their meaning and interpretation. In 1896, the court of appeals held that the addition to subdivision 2 of section 636 was not designed to give the right of attachment to any one except those who gave or extended credit to the debtor relying on the false statement as true; in other words, a false statement in writing, which does not come to the knowledge of the creditor until after the credit is given, is not sufficient to authorize the granting of a warrant of attachment in favor of such creditor. (*Penoyar v. Kelsey*, 150 N. Y. 77).

Subdivision 6.—AGAINST AN ADULT RESIDENT, CONTINUOUSLY WITHOUT THE STATE FOR MORE THAN SIX MONTHS, ETC.

A warrant of attachment may be granted to a plaintiff where the defendant, being an adult and a resident of the state, has been continuously without the state of New York for more than six months next before the granting of an order of publication of the summons against him, and has not made a designation of a person upon whom to serve a summons in his behalf, as prescribed in section 430 of the code of civil procedure; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the state, after diligent effort. (Co. Civ. Proc. § 636, subd. 2).

This clause was added to the section by chapter 578, of the laws of 1895, and, like its predecessor in time and in the section, seems to have required no judicial elucidation.

Subdivision 7.—AGAINST PUBLIC OFFICES.

A warrant of attachment, against the property of one or more defendants in an action, may also be granted, upon the application of the plaintiff, where the complaint demands judgment for a sum of money only; and it appears by affidavit, that the action is brought to recover money, funds, credits, or other property, held or owned by the state, or held or owned officially or otherwise, for or in behalf of a public or governmental interest, by a municipal or other public corporation, board, officer, custodian, agency or agent, of the state, or of a city, county, town, village, or other division, subdivision, department, or portion of the state, which the defendant has, without right, obtained, received, converted, or disposed of; or in the obtaining, reception, payment, conversion or disposition of which, without right, he has aided or abetted; or to recover damages for so obtaining, receiving, paying, converting, or disposing of the same; or the aiding or abetting thereof. In order to entitle the plaintiff to a warrant of attachment, in a case specified in this section, he must show by affidavit, to the satisfaction of the judge granting it, that a sufficient cause of action exists against the defendant, for the sum stated in the affidavit. (Co. Civ. Proc. § 637). The action which is specified in this section is that authorized by section nineteen hundred and sixty-nine of the code of civil procedure, to be brought to recover money, funds or other property, held or owned by the state or otherwise, as prescribed in that section, and which has been obtained without right, or converted, or disposed of. It is to be noted that an attachment can only be granted in the instances covered by the code provisions. For example, there is no provision in the code of civil procedure for granting an attachment against an unincorporated association, sued in the name of its president or treasurer pursuant to sections 1919 to 1924,

of the code of civil procedure, and an attachment cannot be had against the defendant in such a suit. (*Mertz v. Fenouillet*, 13 App. Div. 222).

Sec. 4. When an Attachment Will be Granted.

The warrant may be granted to accompany the summons, or at any time after the commencement of the action, and before final judgment therein. Personal service of the summons must be made upon the defendant, against whose property the warrant is granted, within thirty days after the granting thereof; or else, before the expiration of the same time, service of the summons by publication must be commenced, or service thereof must be made without the state, pursuant to an order obtained therefor, as prescribed in the code of civil procedure; and if publication has been, or is thereafter commenced, the service must be made complete by the continuance thereof. (Co. Civ. Proc. § 638). The court acquires jurisdiction by the granting of the warrant, accompanied by the summons; but such jurisdiction is conditional; and it is liable to be divested, if the summons is not served within the thirty days after the granting of the warrant. (Co. Civ. Proc. § 416; *Waffle v. Goble*, 53 Barb. 517). If the summons has been actually issued, and is in the hands of a proper person for service, an attachment may be granted, and it will be regular, although it is served before the summons. (*Mills v. Corbett*, 8 How. Pr. 500). If the summons is not served within thirty days after the granting of the warrant, the failure to do is jurisdictional, and destroys the warrant, and the proceedings must be vacated on motion (*Cossitt v. Winchell*, 39 Hun, 439; *Betzemann v. Brooks*, 31 Hun, 271); and the proceedings which have been taken under the attachment, become void as to third persons (*Fisher v. Nash*, 47 App. Div. 234), as well as to the defendant; the plaintiff in the attachment suit becomes liable as a trespasser to the party whose property has been attached. (*Ruser v. Union Distilling Co.*, 7 Misc. 396). The failure to serve the summons within the thirty days affects only the attachment and the proceedings thereunder; a service after that time is still

valid, of course, as a service of the summons, and the beginning of an action. (*Sabin v. Kendrick*, 2 App. Div. 96). A voluntary general appearance by the defendant, before the expiration of the thirty days within which the summons must be served, is equivalent to personal service upon him, within this section (*Catlin v. Ricketts*, 91 N. Y. 668), even if service by publication is begun and not completed (*Tuller v. Beck*, 108 N. Y. 355); but if a general appearance is made, after the thirty days has expired, the court will not regain the jurisdiction, which it has lost by a failure to serve the summons within the time required, and the attachment is not revived or validated. (*Blossom v. Estes*, 84 N. Y. 614; *Cossitt v. Winchell*, *supra*). In the case of *Orris v. Goldschmidt* (2 Civ. Proc. Rep. 314), it was held that where the action was brought against a firm, and service was made upon one, but not upon all, before the expiration of the thirty days, the summons was sufficiently served, and that the court did not lose jurisdiction by a failure to serve all the defendants. But in *Donnell v. Williams* (21 Hun, 216), and *Bogart v. Sweezy* (3 Law Bull. 41; *affd.* 26 Hun, 463), the court decided, that in such an action, the attachment of the property ceased to be a lien, unless all the partners were served with summons, or the service upon all was begun, within the thirty days from the granting of the warrant. The cases last cited were before the case of *Orris v. Goldschmidt*, but they are general term decisions, and are not referred to in the case of *Orris v. Goldschmidt*, and they must be deemed properly to state the law. Where an order for the publication of a summons, was obtained on the thirtieth day after the granting of the warrant of attachment, and on that day, copies of the summons were mailed, and the summons and notice were delivered to one newspaper and published, but were not published in another paper until the next day; it was held, that the publication was not commenced within thirty days, as required by this section, and the attachment was vacated. (*Taylor v. Troncoso*, 76 N. Y. 599). If the last of the thirty days falls on Sunday, service on the following day would be sufficient to sustain an at-

tachment. (*Gribbon v. Freel*, 93 N. Y. 93). If the service of a summons by publication has been commenced, before an attachment is granted, the requirements of the statute, as to service of the summons, are sufficiently complied with. (*Baron v. Biaren*, 3 Law Bull. 49). Where an attachment was issued, but the defendant died before the service of the summons, and his administrator was substituted as defendant, but the summons was not served upon him within the thirty days after the granting of the warrant, the jurisdiction was lost, and the warrant was vacated. (*Kelly v. Countryman*, 15 Hun, 97). Where the defendant dies after the granting of an attachment, but before the service of the summons by publication is begun, or completed, the court cannot substitute his personal representatives and have the lien of the attachment continue as to them. (*Barron v. South Brooklyn Saw Mill Co.*, 19 Abb. N. C. 352; *Ludwig v. Blum*, 43 N. Y. St. Rep. 616). The service of the summons required by the section, must be in the manner required by the statute—mere notice is not sufficient. (*Kieley v. Mfg. Co.*, 147 N. Y. 620). There can be no doubt that either service without the state or service by publication, is sufficient, as section 638 expressly says so; personal service is, also, sufficient (*Tuller v. Beck*, 108 N. Y. 355, 357); it was held, in the case of *Bogart v. Sweczey* (26 Hun, 463), that substituted service, under section 435, was not sufficient, and this case seems nowhere to have been overruled. It is apprehended, however, that it is neither sound in principle, nor representative of the law on this point. Section 399 of the code of civil procedure, providing for an attempt to commence an action, requires personal service of the summons, or service by publication, upon the defendant within sixty days after the summons is delivered to the sheriff, and the court of appeals has held that substituted service satisfies the requirement of this section, although no mention of such service is made in the section. (*Clare v. Lockard*, 122 N. Y. 263). The same construction has been put upon section 1670 of the code of civil procedure, providing for personal service, or service by publication of the summons within sixty

days after the filing of a *lis pendens*. (*Ferris v. Plummer*, 46 Hun, 515). It seems that the failure to specify substituted service as one of the permissible methods of service, in sections 399, 638 and 1670, is a mere codifier's error. (*Ferris v. Plummer*, *supra*). Moreover, it is to be noted in this connection that the court of appeals has held a personal appearance within thirty days sufficient under section 638, reading that section with section 424. (*Catlin v. Ricketts*, 91 N. Y. 669). So it seems reasonable to suppose that section 437, providing that the same proceedings may be taken upon a substituted service as upon a service by publication, is also to be regarded in construing section 638. That such is the fact, is indicated by the *dictum* in *Kiely v. Mfg. Co.* (147 N. Y. 620, 622). The fact that the summons was not served, because the defendant requested the plaintiff to suspend the proceedings for a time, does not excuse the failure to serve it, nor does it operate as an estoppel on the defendant so as to prevent the setting aside of the attachment. (*Mojarrieta v. Saenz*, 80 N. Y. 547). Where a plaintiff has obtained an attachment and an order of publication, he may, if he sees fit, abandon them, and take out a new attachment and order, if it does not appear that it was done for the purpose of vexation. (*Id.*). The attachment may be granted any time before final judgment, even if the plaintiff is entitled to judgment at the time he applies for the warrant. (*First Nat. Bk. v. Bushwick Chemical Works*, 17 Civ. Proc. Rep. 229; *affd.* without op., 119 N. Y. 645).

Sec. 5. By Whom Granted.

The warrant may be granted by a judge of the court in which the action is pending, or by any county judge. (Co. Civ. Proc. § 638). The powers of a county judge under this section are not restricted to cases where the action is triable in his own county, nor where the attorney resides in that county. (*Webb v. Bailey*, 54 N. Y. 164).

ARTICLE II.

PAPERS ON WHICH IT MAY BE GRANTED.

SECTION.

1. The affidavit.
2. Security on obtaining warrant.
3. Contents of the warrant.

Sec. 1. The Affidavit.

To entitle the plaintiff to a warrant of attachment, he must show, by affidavit, to the satisfaction of the judge granting the same, as follows:

1. That one of the causes of action specified in section six hundred and thirty-five of the code of civil procedure, exists against the defendant. If the action is to recover damages for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counter-claims known to him.

2. That the defendant is either a foreign corporation, or not a resident of the state; or, if he is a natural person, or a resident of the state, that he has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or, if the defendant is a natural person, or a domestic corporation, that he or it has removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property with the like intent, or where, for the purpose of procuring credit, or the extension of credit, the defendant has made a false statement in writing, under his own hand or signature, or under the hand or signature of a duly authorized agent, made with his knowledge or acquiescence, as to his financial responsibility or standing; or where the defendant being an adult and a resident of the state, has been continuously without the state of New York for more than six months next before the granting of an order of publication of the summons against him, and has not made a designation of a person upon whom to serve a sum-

mons in his behalf, as prescribed in section 430; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the state, after diligent effort. (Co. Civ. Proc. § 636). It is always necessary that the application should be founded upon an affidavit. (*Zerega v. Benoist*, 7 Robt. 199). In this case as in others, a verified pleading is regarded as an affidavit. (Co. Civ. Proc. § 3343, subd. 11). When so used, however, it should comply with the requirements of other affidavits as to the manner of stating the facts. It should also be recited in the warrant, to show that it has been used. (*People v. St. Nicholas Bk.*, 44 App. Div. 313). The affidavit, however, need not be an affidavit of the plaintiff; it may be made either by the plaintiff, or by another person who is familiar with the facts (*Edick v. Green*, 38 Hun, 202), or by more than one person (*Jaffray v. Nast*, 32 N. Y. St. Rep. 350; *White v. Reichert*, 14 Wk. Dig. 285). If an action is brought by a firm, the affidavit of one of the plaintiffs is sufficient. (*Stevens v. Middleton*, 26 Hun, 470). A most reasonable rule was laid down in *James v. Richardson* (39 Hun, 599; app. dismissed, 102 N. Y. 731), to the effect that positive statements in an affidavit made by an agent, on an application by his principal for an attachment, would be presumed to have been made upon personal knowledge, unless stated to be on information, or unless it should appear affirmatively or by fair inference that they could not have been, or were not made, on such knowledge. Such would seem to be still the rule of construction throughout the state, except in the first department. (*Pierson v. Freeman*, 77 N. Y. 589; *Patterson v. Delaney*, 14 N. Y. Supp. 100; *Lacker v. Dresher*, 38 App. Div. 75; *Wicker v. Village of Elmira Heights*, 42 App. Div. 426; see, however, *Shuler v. Birdsall Mfg. Co.*, 17 App. Div. 228, *semble*). In the first department, however, the rule is well-settled the other way, and an absolute statement in such an affidavit will not be deemed based upon personal knowledge, in the absence of evidence in the affidavit, from which the inference can be drawn that such personal knowledge existed (*Hoorman v. Climax Cycle Co.*, 9 App.

Div. 579; *Martin v. Aluminum etc. Co.*, 44 App. Div. 512); and such allegations are held to furnish no proof of the facts alleged, despite a direct affirmation of knowledge. (*Tucker v. Goodsell Co.*, 14 App. Div. 89). In the light of these last-cited cases, and the firm establishment of this peculiar rule in the first department, it is necessary in the first, and safer, doubtless, in any other, department, to state the facts and relationships giving the opportunity for personal knowledge of statements made absolutely. Each case must rest on its own facts, as to whether the facts and relationships shown in the affidavit satisfy the judicial mind that personal knowledge existed. An assignee's positive statements, with nothing to show a prior relationship, are not presumed to have been made on personal knowledge (*Hoorman v. Climax Cycle Co.*, *supra*); such statements by the cashier of the plaintiff bank as to the existence of certain documents bearing on the action are sufficient (*Merchants' Nat. Bk. v. Columbia Co.*, 21 App. Div. 383); as to affidavits by officers of corporations, see *Anthony v. Fox* (53 App. Div. 200), and cases there cited; it is always advisable to show clearly that the officer making the affidavit was connected with the corporation at the time of the occurrence of the facts set forth. Citations might be multiplied indefinitely to show what circumstances convince the court that an affidavit is neither prevaricating, nor over-reckless; as said before, each case must rest on its own facts. The affidavit should in general be upon the personal knowledge of the affiant, and must be positive in its statements. (*St. Amant v. De Beircedon*, 3 Sand. 703). The statement of the cause of action in affidavits, on an application for an attachment, should be clear, concise and explicit. The proof must be to the "satisfaction of the judge" granting the attachment, and this satisfaction must be judicial and not personal. (*Duryea, Watts & Co. v. Rayner*, 11 Misc. 294). Conclusions and expressions of opinion are not "satisfactory." (*Lehmaier v. Buchner*, 14 App. Div. 263). Facts sufficient to show the intent and attempt to defraud, being stated also, where they are necessary; and where the latter cannot be sworn to on positive

knowledge, the sources from which, and the persons from whom, the information is derived should be given, together with the reason why the affidavits of those having positive knowledge of the facts cannot be procured. (*Bennett v. Edwards*, 27 Hun, 352). If a person, having positive knowledge of facts sufficient to warrant the issuing of an attachment, refuses to make affidavit to those facts, it is not necessary for the party applying for the attachment, to obtain an order for his examination under section eight hundred and eighty-five of the code of civil procedure; but the fact of such refusal may be stated, together with the knowledge the person is known to possess, and any affidavit made by such reluctant witness, showing the facts, if on file, may be quoted and referred to in the moving affidavit. (*Id.*). The affidavit must set forth such facts and circumstances as will support the grounds upon which the application is based. Where the facts are stated on information and belief, it should allege that affiant believes such information, and should set forth facts showing that his informers are absent, or that their depositions cannot be obtained (*Steuben Co. Bk. v. Alberger*, 78 N. Y. 252; *Abrams v. Levine*, 90 Hun. 566; *Scott v. Beaudet*, 62 Hun, 50), or, where the information is derived from affidavits on file, that original affidavits from such affiants are not obtainable (*Selser Bros. v. Potter Produce Co.*, 77 Hun, 313), and the sources of the information should also be stated as specified above. (*Neal v. Sachs*, 15 Wk. Dig. 476). Allegations upon information and belief are sufficient, where, in addition to the requirements last stated, it is made to appear therein that the information furnished by such affidavits is such that a person of reasonable prudence would be willing to accept and act upon it (*Buell v. Van Camp*, 119 N. Y. 160, 165); the mere averment of a fact, however, upon information and belief, without more is not sufficient (*Id.*), unless the sources of the information and the grounds of the belief are stated. (*Hunt v. Robinson*, 52 App. Div. 539). For comparatively recent examples as to telephonic sources of information, see *Andrews v. Schofield* (27 App. Div. 90) and *Murphy v. Jack* (142 N. Y. 215), in both of

which cases the information was held to be unsatisfactory. Here, again, each case must rest on its own facts as to what information is sufficient and it is a work of supererogation to multiply citations. Where it is essential to the cause of action to prove the existence of a certain document, the most satisfactory method, of course, is by annexing the instrument itself to the affidavit, but it is not necessary that this be done; positive averments of its contents by one in a position to have personal knowledge is sufficient. (*Merchants' Nat. Bk. v. Columbia Co.*, 21 App. Div. 383). Where the sources of information are affidavits on file, copies of such affidavits should be set forth. (*Smith v. Arnold*, 33 Hun, 484; appeal dismissed, 100 N. Y. 640; *Whitney v. Hirsch*, 39 Hun, 325; *Selser Bros. v. Potter Produce Co.*, 77 Hun, 313). Although it is necessary that an action has been begun, or a summons has been, or is about to be, issued, that fact need not be stated in the affidavits. (*Stevens v. Middleton*, 26 Hun, 470; *Frankel v. Hays*, 20 Wk. Dig. 417). The affidavits must show that a cause of action of which the court has jurisdiction exists, and the facts constituting the cause of action must be set forth in the affidavits. (*Walts v. Nichols*, 32 Hun, 276; *Smith v. Davis*, 29 Hun, 306; *People v. St. Nicholas Bk.*, 44 App. Div. 313). It is necessary also to set forth in the affidavits facts showing the plaintiff's right to maintain the action; so, where an attachment is applied for by a foreign corporation doing business in the state, or its assignee the affidavits must show that the certificate, required by section 15, of the General Corporation Law, had been obtained. (*Sawyer Lumber Co. v. Bissell*, 84 Hun, 224); of course the obtaining of such certificate need not be shown where it does not appear that the corporation is doing business in the state nor that the contract sued on was made in the state. (*Lukens Iron & Steel Co. v. Payne*, 13 App. Div. 11). If a cause of action is not shown in the affidavits, it is a fatal jurisdictional defect. (*Jacobs v. Hogan*, 85 N. Y. 244). If a verified complaint is relied on as an affidavit, and the allegations, or any portion of them, are made upon information and belief, a positive affidavit verifying its

statements, makes it sufficient evidence of the existence of the cause of action. (*Edick v. Green*, 38 Hun, 202). The affidavits need not state in terms that the cause of action is not for a breach of a promise of marriage, if that fact necessarily appears by them. (*Edick v. Green, supra*). The amount due to the plaintiff must appear in the papers, and a demand for judgment for less than the complaint shows the plaintiff to be entitled to, does not affect the right to an attachment. (*Hamilton v. Penney*, 29 Hun, 265). In stating the amount which the plaintiff is entitled to recover, as is made necessary by subdivision one of section six hundred and thirty-six it is not necessary to use the precise words of the statute, although they furnish the safest formula. (*Ruppert v. Haug*, 87 N. Y. 141). Those words, or equivalent words, or at least statements from which the court can see that the facts required by that subdivision do actually exist, must be stated. Where an affidavit, as to the amount which the plaintiff is entitled to recover, is made by an agent, it must contain something, from which the court can see how he could know the facts which enable him to make the statement; although the description of his relations to the transaction may be sufficient, yet some circumstances, showing his relation to the knowledge of his business must be presented. (*Buhl v. Ball*, 41 Hun, 61; appeal dismissed, 106 N. Y. 672; *Smith v. Arnold*, 33 Hun, 484; appeal dismissed, 100 N. Y. 640); as, for example, that the affiant was the general agent of the plaintiff and was conversant with the plaintiff's business, which the plaintiff was not. (*Washburn v. Carthage Nat. Bk.*, 86 Hun, 396; *affd. on op. below*, 155 N. Y. 690). Where a corporation is plaintiff, an affidavit made by a cashier that the plaintiff was entitled to recover a sum therein stated and interest, over and above all counter-claims known to the plaintiff, was held to be sufficient (*National Park Bank v. Whitmore*, 40 Hun, 499; appeal dismissed, 104 N. Y. 297); or by the secretary. (*E. W. Bliss Co. v. Opera Glass Supply Co.*, 60 Hun, 438). A statement that the amount of the plaintiff's claim was a specified sum, "over and above all discounts and set-offs," was also held to be sufficient,

(*Lamkin v. Douglass*, 27 Hun, 517). The plaintiff must state that he is entitled to recover a particular sum, which is specified. A general averment of damages is not sufficient. (*Golden Gate Con. Co. v. Jackson*, 13 Abb. N. C. 476). Where the damages are unliquidated, the affidavits must set forth the facts showing a substantial injury; a mere allegation of having suffered damage in a certain amount is insufficient. (*Westervelt v. Agrumaria etc., Societa*, 58 Hun, 147); the evidence to prove damages, as distinguished from conclusions of fact proper to a complaint, must be shown. (*Delafield v. Ormsby Co.*, 62 App. Div. 262). Neither is it sufficient for the affidavit to state that the plaintiff is entitled to recover "the sum of ten thousand dollars, or other larger sums, with interest," over and above all counter-claims, etc. (*Thorington v. Merrick*, 101 N. Y. 5). Where the affidavit is made by the plaintiff himself, the words "known to him" have been held to be non-essential (*Alford v. Cobb*, 28 Hun, 22); where an agent makes the affidavit, it is not sufficient to recite that the plaintiff is entitled to recover a certain amount over and above all counter-claims "known to the deponent" (*Murray v. Hankin*, 30 Hun, 37; *Smith v. Holt*, 37 App. Div. 24), inasmuch as the clause in question requires satisfactory proof that there are no counter-claims to the plaintiff's knowledge (*Marine Nat. Bk. v. Ward*, 35 Hun, 395); such a statement by an agent is sufficient, however, where it appears from the affidavit that the affiant was the plaintiff's general agent and knew all about the plaintiff's business, to which the plaintiff himself paid no attention. (*Washburn v. Carthage Nat. Bk.*, 86 Hun, 396; affd. on op. below, 155 N. Y. 690). If one member of a firm makes the affidavit, it is not necessary that it should appear that there were no counter-claims, which were known to the other members of the firm. (*Stevens v. Middleton*, 4 Law Bull. 1; affd. 26 Hun, 470). Where a statement in the affidavit, that an amount is due, over and above all counter-claims known to the plaintiff, is made upon information and belief, the affidavit is not sufficient, and the attachment will be vacated. (*Acker v. Jackson*, 3

How. Pr. N. S. 160). The requirement is only as to the knowledge of the actual plaintiff as to counter-claims against himself; if the plaintiff is an assignee, he need not show that there were no counter-claims against his assignor, nor need he show anything as to his assignor's knowledge of counter-claims. (*Selser Brothers v. Potter Produce Co.*, 80 Hun, 554; *affd.* without op. 144 N. Y. 646; *Crowns v. Vail*, 51 Hun, 204). It must appear in the affidavit either expressly, or by fair inference, that the debt, which the action was brought to recover, is due. (*Reilly v. Sisson*, 31 Hun, 572; *Smadbeck v. Sisson*, 31 Hun, 582). Where an application for an attachment is upon the ground that the defendant is a foreign corporation, an allegation of that fact gives the court jurisdiction to grant the warrant. (*Lee v. Valley Paper Mill*, 1 Law Bull. 10). If the application is upon the ground that the defendant is a non-resident, it is not necessary to allege that fact in positive terms; but the affidavit will be sufficient, if the conclusion of non-residence is one necessary to be drawn from the facts, which are stated in the affidavit. (*Mayor etc. v. Genet*, 4 Hun, 487; *affd.* 63 N. Y. 646; *Thames & Mersey Marine Ins. Co. v. Dimick*, 22 N. Y. Supp. 1096; *Everitt v. Park*, 88 Hun, 368). It is, also, to be remembered that the necessary fact to be shown, is the defendant's non-residence, and it is not essential to show where he resides without the state. (*Steel v. Raphael*, 13 N. Y. Supp. 664; S. C. 37 N. Y. St. Rep. 623). The plaintiff has the burden of showing that the fact exists. (*Ricetti v. Mapleson*, 22 Wk. Dig. 215). Where an order was granted upon an affidavit, which alleged the fact of non-residence upon information and belief, although it was accompanied by the sheriff's certificate of non-residence, that defect was held to be fatal on a motion to vacate the order. (*Lyon v. Baxter*, 64 How. Pr. 426). The affidavit must state the facts, which show that the defendant has absconded, or concealed himself, or disposed of his property (*Neal v. Sachs*, 15 Wk. Dig. 476), and that it was with the intent of defrauding creditors, or to avoid the service of summons. (*Hertz v. Stuart*, 3 Wk. Dig. 332). As we have seen, it is not necessary to allege

that the departure is secret; the intent with which it was made is the only material thing. (*Morgan v. Avery*, 7 Barb. 656). Mere conjectures that the defendant has absconded, or concealed himself, or is about to dispose of his property, are not sufficient to sustain the attachment (*Von Moppes v. Leimbach*, 22 Wk. Dig. 337); neither is a general allegation of the facts on information and belief. (*Steuben Co. Bank v. Alberger*, 78 N. Y. 252). Allegations of the deponent's belief, as to the intent of the defendant, are not sufficient; the facts must be stated from which such intent can be reasonably inferred, (*Salzberg v. Mandelbaum*, 89 Hun, 497); and there must be evidence from which no inference of an honest purpose can be drawn. (*Merriam v. Wood & Parker Co.*, 19 App. Div. 329). If it is doubtful whether the defendant has departed from the state, or keeps himself concealed within the state, the plaintiff may charge in the disjunctive that he has done one or the other; and if his intent is doubtful, whether to defraud creditors, or to avoid service, the affidavit may charge each intent, and all the facts must be stated, so that the court may see that one or the other may be inferred (*Van Alstyne v. Erwine*, 11 N. Y. 331; *Garson v. Brumberg*, 75 Hun, 336); but statements in the disjunctive are generally insufficient and should be avoided. (*Cronin v. Crooks*, 143 N. Y. 352; *Williams v. Rightmyer*, 88 Hun, 372); so a conjunctive statement that the defendant "has assigned and disposed of, and is about to assign, etc." has been held inadequate. (*Johnson v. Buckel*, 65 Hun, 601; *Hale v. Prote*, 75 Hun, 13). Where an action is brought by a corporation, the affidavit need not state whether it is a domestic or a foreign corporation. (*Lee v. La Compagnie Unicerselle etc.*, 2 N. Y. St. Rep. 612). Where, however, an action is brought against an alleged foreign corporation, and an attachment is sought because of such foreign incorporation, the affidavits must show clearly that it is a foreign corporation; an allegation that the "defendant held or holds itself out to be a foreign corporation created under the laws of West Virginia," is not good. (*Shanks v. Magnolia Metal Co.*, 89 Hun, 486). In connection with

the first department rule, heretofore noted, requiring some evidence in the affidavit that the affiant has personal knowledge of facts he swears to positively, it is to be noted that certificates of incorporation are matters of public record open to every one, so that an absolute averment that the defendant is a foreign corporation created under the laws of of some other state will be deemed to be based on personal knowledge. (*Randolph v. Susquehanna Water Co.*, 12 App. Div. 479). The affidavits need not state that the defendants have property within the state. (*Lawton v. Kiel*, 51 Barb. 30). It is not necessary that it should appear by the affidavits, that no previous application has been made, as required by rule twenty-five. (*Davis v. Brooks*, 4 Law Bull. 49; affd. 14 Wk. Dig. 454; affd. 90 N. Y. 653). In the case of *Mojarrieta v. Saenz* (80 N. Y. 547), the court of appeals declined to pass on the question whether it was necessary to state that no previous application had been made; saying that in any event it was a mere irregularity, and had no effect upon the jurisdiction of court; and was not a question that was necessary to be considered in that court. A party to an action cannot be compelled to make an affidavit, upon which to base an application for a warrant of attachment (*James v. Richardson*, 39 Hun, 399); but a person other than a party can be compelled to make a deposition, under section eight hundred and eighty-five of the code. (*Allen v. Meyer*, 73 N. Y. 1). Where an attachment has been vacated for a defect in the affidavit, the same papers with an additional affidavit supplying the defect, may be used to obtain another attachment. (*Acker v. Jackson*, 3 How. Pr. N. S. 160; *Mojarrieta v. Saenz*, 80 N. Y. 547). Upon an application for a warrant of attachment, it is not necessary that the facts stated in the affidavit should be decisive of every fact, which is required to entitle the plaintiff to the attachment; if the affidavits tend to prove the necessary facts, and establish a *prima facie* case, the court will grant the attachment. (*Cooney v. Whitfield*, 41 How. Pr. 6; *Lee v. La Compagnie Universelle etc.*, 2 N. Y. St. Rep. 612; *Everitt v. Park*, 88 Hun, 368). If the affidavit sets forth enough to call

upon the officer to exercise his judgment whether or not the necessary facts exist, he has acquired jurisdiction to act (*Skinnion v. Kelley*, 18 N. Y. 355; *Kissock v. Grant*, 34 Barb. 144); and such affidavits will be held sufficient, on a motion to vacate the attachment for irregularity. (*Furman v. Walter*, 13 How. Pr. 348; *Easton v. Malarazi*, 7 Daly, 147). In an action against a public officer for speculation, or in an action to recover damages for injury to personal property where the liability arose in consequence of the false statements in writing of the defendant as to his responsibility or credit, under section six hundred and thirty-seven, the facts necessary to entitle the plaintiff to an attachment, must be made to appear by affidavit, as is required in other actions; and the rules hereinbefore stated as to the manner of alleging the facts, apply in that action, as in other actions.

The party procuring the warrant must, within ten days after the granting thereof, cause the affidavits upon which it was granted, to be filed in the office of the clerk. (Co. Civ. Proc. § 639). The word "clerk" signifies the clerk of the court where the action is triable. (Co. Civ. Proc. § 3343, subd. 4). A failure to file the affidavits does not affect the validity of the warrant, or the proceedings under it; and it will not be vacated as a matter of course, because the affidavits are not filed. (*Brash v. Wiclarsky*, 36 How. Pr. 253; *Woodward v. Stearns*, 10 Abb. Pr. N. S. 395).

Sec. 2. Security on Obtaining the Warrant.

The judge, before granting the warrant, must require a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect, that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs, which may be awarded to the defendant, and all damages, which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least two hundred and fifty dollars. But this section does not apply to a case where the action is brought for a cause specified in section six hundred and thirty-seven of the

code of civil procedure, or where it is specially prescribed by law that security may be dispensed with, or where the security to be given is specially regulated by law. (Co. Civ. Proc. § 640). As to the execution and approval, and the formal requirements and filing of the undertaking, see chapter VIII, *ante*. The section requiring security is imperative, and the court cannot dispense with the security, or accept a deposit of money in lieu of it. (*Bate v. McDowell*, 48 Super. 219; *affd.* without op., 99 N. Y. 665). If the undertaking given upon granting the warrant is defective, the court may order a new undertaking without vacating the warrant, in its discretion. (*Lamkin v. Douglass*, 27 Hun, 517). The court or judge, granting the warrant, may fix the amount of the undertaking, and require an increase of it, or an additional undertaking, when it deems proper in its discretion. (*Whitney v. Deniston*, 2 T. & C. 471; *Riggs v. C. Y. & P. R. R. Co.*, 21 Wk. Dig. 45; *Manda v. Etienne*, 13 App. Div. 237). The court will order an increase of the undertaking, when the amount of property levied upon by the sheriff is larger than was contemplated at the time of the granting of the warrant. (*Id.*). Such increase, however, is in the discretion of the court at special term, or of the judge who granted the warrant. The bankruptcy of the principal and his discharge does not discharge the sureties upon the undertaking. (*McCombs v. Allen*, 82 N. Y. 114). The liability of the sureties is absolute, and no demand of the principal debtor is necessary before bringing an action against them. (*Currie v. Riley*, 14 Wk. Dig. 407). The sureties on an undertaking are liable for all expenses consequent upon efforts to have an attachment vacated, although no property has been taken under it (*Id.*); but they are entitled to the benefit of all payments of costs and damages made by the principal; and they cannot be made liable in any event, for more than the difference between the sum paid by him and the amount of the undertaking. (*Bacre v. Armstrong*, 26 Hun, 19). Ordinarily sureties are not liable for general counsel fees incurred in the trial of the action in which the attachment was granted (*Northampton Nat. Bk. v. Wylic*,

52 Hun, 146), but where, despite every effort to get rid of the attachment, the only successful method was the trial of the action, such general counsel fees should be allowed. (*Tyng v. Am. Surety Co.*, 48 App. Div. 240). The phrase "recover judgment," used in section six hundred and forty, refers to the final decision on appeal, if an appeal is taken. So that if the plaintiff recovers judgment which is reversed on appeal, the sureties are liable on their undertaking. (*Bennett v. Brown*, 20 N. Y. 99). It is not a defense to an action upon an undertaking, given upon granting a warrant of attachment, that the warrant was granted improperly, for want of jurisdiction, or for any other cause. (Co. Civ. Proc. § 642). In an action upon an undertaking, the surety cannot contradict a recital in it that an attachment had been issued. (*Coleman v. Bean*, 3 Keyes, 94).

Sec. 3. Contents of the Warrant.

The warrant must be subscribed by the judge and the plaintiff's attorney, and must briefly recite the ground of the attachment. It may be directed, either to the sheriff of a particular county, or, generally, to the sheriff of any county. It must require the sheriff to attach and safely keep so much of the property, within his county, which the defendant has, or which he may have, at any time before final judgment in the action, as will satisfy the plaintiff's demand, with costs and expenses. The amount of the plaintiff's demand must be specified in the warrant, as stated in the affidavit. Warrants may be issued at the same time to sheriffs of different counties. (Co. Civ. Proc. § 641). The warrant does not require a formal teste, nor the signature of the clerk, nor a seal. (*Gcnin v. Tompkins*, 12 Barb. 265). If the original warrant is signed by the judge, the copy served is not irregular, although it has no copy of the judge's signature. (*Greenleaf v. Mumford*, 19 Abb. Pr. 469; 30 How. Pr. 30; reversed on another point, 4 Abb. Pr. N. S. 130). The warrant may be amended upon a motion to vacate it for irregularity. (*Kissam v. Marshall*, 10 Abb. Pr. 424). Upon an appeal, if the warrant does not appear in the papers, it will

be presumed to have been granted upon all the grounds established by the affidavits. (*Dinan v. Allen*, 16 Hun, 407). Under the code of procedure, it was not necessary that the grounds of the attachment should be recited in the warrant. (*Mayor etc. v. Genet*, 63 N. Y. 646). But, as will be seen, the code of civil procedure expressly requires that this should be done; and the case last cited is no longer the law upon that point; but it is still an authority for the proposition that nothing need be contained in the warrant, except what is expressly required by the statute. The grounds of the attachment should not be stated in the disjunctive, and, if so stated the warrant is defective. (*Cronin v. Crooks*, 143 N. Y. 352; *Williams v. Rightmyer*, 88 Hun, 372), except where the ground is set forth as being that the debtor has "departed from the state with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent." (*Garson v. Brumberg*, 75 Hun, 336; *Stewart v. Lyman*, 62 App. Div. 182); so, also, a recital of the ground as being that "the defendants have assigned, disposed of, or secreted their property with intent to defraud their creditors," is good, being one class only of the grounds as they are arranged in section 636 of the code. (*Smith, Perkins & Co. v. Wilson*, 26 Hun, 565). Of course, more than one ground may be stated, and if the conjunction "and" is used instead of "or," between the different grounds, the recital is sufficient if any of the grounds are borne out by the affidavits (*Stone v. Pratt*, 90 Hun, 30), unless the grounds are inconsistent (*Johnson v. Buckel*, 65 Hun, 601). As the court has inherent power to order an amendment of the warrant of attachment, a failure, either totally or properly to recite the grounds in the warrant may be amended. (*Stone v. Pratt*, *supra*; *King v. King*, 59 App. Div. 128).

ARTICLE III.

EXECUTION OF THE WARRANT.

SECTION.

1. By whom, and how made.
2. What property may be attached.
3. How property to be attached.
4. Rights of master or owner of vessel.
5. Inventory.
6. Action by sheriff and attaching creditor.
7. Care of the property.
8. Claim of property.
9. Proceedings on claim of vessel.

Sec. 1. By Whom and How Made.

The sheriff must immediately execute the warrant, by levying upon so much of the personal and real property of the defendant, within his county, not exempt from levy and sale by virtue of an execution, as will satisfy the plaintiff's demand, with the costs and expenses. He must take into his custody all books of account, vouchers, and other papers, relating to the personal property attached, and all evidences of the defendant's title to the real property attached, which he must safely keep, to be disposed of, as prescribed in title three of chapter seven of the code of civil procedure. The sheriff, to whom a warrant of attachment is delivered, may levy, from time to time, and as often as is necessary, until the amount for which it was issued, has been secured, or final judgment has been rendered in the action, notwithstanding the expiration of his term of office. (Co. Civ. Proc. § 644). The original warrant must be delivered to the sheriff. (*Niagara Grape Market Co. v. Wygant*, 1 App. Div. 588). The sheriff to whom a warrant of attachment is directed, cannot act under it outside of his own county. (*Matter of Tilton*, 19 Abb. Pr. 50). A levy under a warrant cannot be made after final judgment in the action. (*Lynch v. Crary*, 52 N. Y. 181). Upon the execution of the warrant, the sheriff may open a safe or box, not being a part of the dwelling, in which the property is, and he may exclude the counsel or agent of each party from

being present, while he is so doing. (*United States v. Graff*, 67 Barb. 304). The sheriff has a reasonable discretion as to the amount of property he will levy upon (*Wehle v. Conner*, 83 N. Y. 231); and that discretion is not to be controlled by either party. If the defendant have sufficient property to satisfy the judgment, and the sheriff knowingly neglect to levy upon enough, he is liable for the deficiency. (*Ransom v. Halcott*, 18 Barb. 56). If a sheriff seizes, upon a warrant, goods of a wrong person, he is liable to that person. (*Kuhlman v. Orser*, 5 Duer, 242). The sheriff may require indemnity, before executing the attachment upon goods which he finds in the possession of a third person. (*Chamberlin v. Beller*, 18 N. Y. 115). Where property of the defendant is in the hands of the sheriff, at the time the warrant is delivered to him, no formal levy or notice is necessary to subject it to the lien of the attachment. (*Wehle v. Conner*, 83 N. Y. 231). The statute requires the sheriff to return the inventory, which he makes pursuant to section six hundred and fifty-four of the code. But there is no provision for the return of the attachment, except that contained in section seven hundred and twelve, which provides that where the warrant has been vacated or annulled, the sheriff must forthwith file in the clerk's office, the warrant, with a return of his proceedings thereon (*Tuck v. Manning*, 63 Hun, 345; *affd. on op. below*, 137 N. Y. 630), and a sheriff's return that the attachment has been "merged in a judgment and execution" is unauthorized and of no effect. (*Id.*). Upon the application of either party, and proof of the sheriff's neglect, the court may direct him to comply with the provisions of section 712; disobedience to such an order may be punished as a contempt of court. (Co. Civ. Proc. § 681). The requirement for the return of the inventory is merely directory; and a failure to make it will not invalidate the levy. (*Rodgers v. Bonner*, 45 N. Y. 379, 386).

Sec. 2. What Property may be Attached.**Subdivision 1.—REAL PROPERTY.**

The real property, which may be levied upon by virtue of a warrant of attachment, includes any interest in real property, either vested, or not vested, which is capable of being aliened by the defendant. (Co. Civ. Proc. § 645). Any equitable interest of the defendant in real property may be levied upon under a warrant (*Lee v. Hunter*, 1 Paige, 519), such, for example, as unmeasured rights of dower (*Latourette v. Latourette*, 52 App. Div. 192), or the interest of a vendee in possession of lands, under a contract for the purchase thereof. (*Higgins v. McConnell*, 130 N. Y. 482).

Subdivision 2.—PERSONAL PROPERTY.

Anything which may be taken in execution may be taken upon an attachment by the sheriff. (*Patterson v. Perry*, 5 Bosw. 518). The mortgagor of personal property has a leviable interest in it, so long as the possessory right remains in him (*Hall v. Sampson*, 35 N. Y. 274); but the right of the mortgagor, to redeem a chattel taken by the mortgagee, is not subject to be levied upon under an attachment. (*Cutler v. The James Goold Co.*, 43 Hun, 516). If the sheriff has attached property in the possession of the mortgagor, he may sell it, although the mortgagee has become entitled to the possession, leaving the mortgagee to follow the property in the hands of the purchaser. (*Hathaway v. Brayman*, 42 N. Y. 322). Money, which has been collected by the sheriff upon an execution in favor of the defendant, and which is in his hands, is liable to an attachment. (*Wehle v. Conner*, 83 N. Y. 231). The interest of a partner in the firm property can be levied upon in an attachment against that member of the partnership (*Smith v. Orser*, 42 N. Y. 132); and the sheriff must take possession of the partnership property; but he must not interfere with the rights of the other partners more than is necessary to reach the interest of the debtor partner, and only the interest of the individual member can be

sold. (*Atkins v. Saxton*, 6 Wk. Dig. 210; S. C., 77 N. Y. 195; *Souls v. Cornell*, 15 App. Div. 161). The property of an insolvent foreign corporation within this state, may be levied upon under an attachment, although a receiver of the corporation has been appointed in its own state; and if a receiver of the property of the corporation is subsequently appointed in this state, his title is subject to the lien which has been acquired by the attaching creditor. (*Dunlop v. Paterson F. Ins. Co.*, 12 Hun, 627; *affd.* 74 N. Y. 137). Property capable of manual delivery, which may be levied upon by taking it into the actual possession of the officer, and which the judgment debtor has fraudulently disposed of, with intent to defraud his creditors, may be seized under an attachment (*Hess v. Hess*, 117 N. Y. 306); unless its identity has been changed. (*Lawrence v. Bank of the Republic*, 35 N. Y. 320). But an attachment cannot be levied on the proceeds of such property, if it has been sold. (*Matter of Foley*, 10 Daly, 4). The power given to the sheriff, by section six hundred and forty-four, to take into his custody all books of account, vouchers and other papers, relating to the personal property attached, and all evidences of the defendant's title to the real property attached, does not authorize him to seize the correspondence of the defendant, nor to do any other act with regard to the papers or books than to keep them safely. (*Hergman v. Dettlebach*, 11 How. Pr. 46). Under a warrant of attachment against a foreign corporation, other than a corporation created by or under the laws of the United States, the sheriff may levy upon the sum remaining unpaid upon a subscription to the capital stock of the corporation, made by a person within the county, or upon one or more shares of stock therein, held by such a person or transferred by him, for the purpose of avoiding payment thereof. (Co. Civ. Proc. § 646). The rights or shares which a defendant has in the stock of an association or corporation, together with the interests and profits thereon, may be levied upon; and the sheriff's certificate of the sale thereof entitles the purchaser to the same rights and privileges, with respect thereto, which the defendant

had when they were so attached. (Co. Civ. Proc. § 647). The stock of a foreign corporation, which has its principal office in this state, is not subject to attachment, where the defendant who owns the stock is a non-resident, and the certificate has not been within the state. Section six hundred and forty-seven, above cited, only applies to shares of a domestic corporation. (*Plimpton v. Bigelow*, 93 N. Y. 592). But the interest of a non-resident owner in certificates of stock in a foreign corporation, which have been pledged to a resident as security for a debt, can be levied upon. (*Simpson v. The Jersey City Contracting Co.*, 165 N. Y. 193). Stock, which has been transferred by the defendant as collateral security, cannot be levied upon, on an attachment against him. (*Smith v. American Coal Co.*, 7 Lans. 317). The attachment may also be levied upon a cause of action arising upon contract; including a bond, promissory note, or other instrument for the payment of money only, negotiable or otherwise, whether past due, or yet to become due, executed by a foreign or domestic government, state, county, public officer, association, municipal or other corporation, or by a private person, either within or without the state; which belongs to the defendant, and is found within the county. The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the debt represented thereby. (Co. Civ. Proc. § 648). Under this section a judgment in favor of the defendant may be levied on. (*Matter of Flandrow*, 84 N. Y. 1). Money deposited with the clerk, in lieu of an undertaking on appeal, is leviable under an attachment against the person who deposits it; but the levy is subject to the right of the respondent upon the appeal, and it cannot be taken out of the possession of the clerk. (*Dunlop v. Patterson F. Ins. Co.*, 74 N. Y. 145). The unpaid purchase price for goods sold may be taken on an attachment against the seller. (*Kelly v. Babcock*, 49 N. Y. 318). Money in the hands of a depository, for the purpose of compromising with the defendant's creditors, may be levied upon by virtue of an attachment against him, until it is actually turned over pursuant to the com-

promise. (*Lynch v. Crary*, 34 Super. 461; reversed on another point, 52 N. Y. 181). A debt due to the defendant may be attached, although the debtor has promised the defendant to pay it to a third person, if such third person has had no notice of the agreement, and not acceded to it. (*Kelly v. Roberts*, 40 N. Y. 432). Choses in action, which have been transferred before the levy, belong to the assignee, and cannot be levied upon on an attachment against the assignor (*Gibson v. Natl. Park Bank*, 98 N. Y. 87); although they were transferred in fraud of creditors. (*Anthony v. Wood*, 96 N. Y. 180). The provision of the code, that, where the property sought to be attached is capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, the levy has to be made by taking the same into the actual custody of the sheriff, changes merely the mode of making the levy, but in no respect alters the inherent character of the property sought to be attached. If a note or bond has been transferred, however fraudulently, no lien by attachment is possible, and it is of no consequence that the mode of executing the process has been changed; the note is not turned into a chattel by the new provision; it remains a chose in action, and when the legal title is in the attachment debtor, the debt may be seized by taking the note or bond, which is its evidence. But where the legal title has been transferred to a third person, and is not in the debtor to be attached, the possession of the note by the officer under his warrant accomplishes nothing. (*Anthony v. Wood*, *supra*). The lien of the attachment, on funds of the debtor in a bank, is not defeated by the owner procuring a certified check from the bank for it, unless it is shown that the check has been paid to a *bona fide* holder, or is outstanding in his hands. (*Gibson v. National Park Bank*, 98 N. Y. 87; *Capital City Bk. v. Parent*, 134 N. Y. 527). Where the makers of a check have torn off their signature from it, it ceases to be a chose in action and leviable upon on an attachment against the payee. (*Casper v. Wallace*, 50 Super. 147). Where an attachment is against one member of a firm, a debt, which is due from a third person to the firm,

cannot be levied upon under it. (*Barry v. Fisher*, 8 Abb. Pr. N. S. 369). A debt due to a non-resident by a foreign corporation, which has no agency in this state, or by a non-resident, is not a subject of levy under an attachment (*Willet v. Equit. Ins. Co.*, 10 Abb. Pr. 193; *Carr v. Corcoran*, 44 App. Div. 97). The bonds of a corporation, which have not been issued, have not yet become choses in action, which can be taken under an attachment. (*Sickles v. Richardson*, 23 Hun, 559). Money which has been deposited with a trustee, in pursuance of an agreement to pay the debt of the defendant, and which is no longer subject to the control of the defendant, is not the subject of levy by virtue of an attachment against him. (*Rogers Loco. Works v. Kelly*, 88 N. Y. 234). Money raised by a county tax, in the hands of a bank as the county's agent for the payment of the interest coupons on the county's bonds, is not subject to levy. (*Van Horn v. Kithitas Co.*, 28 Misc. 333; *affd. on op. below*, 46 App. Div. 623). Where the defendant is a public officer, his salary cannot be levied upon by an attachment against him, while it is in the hands of the disbursing officer of the government. (*Buckley v. Eckert*, 3 Penn. St. 268; *Cornell v. Funk*, 1 City Ct. Rep. 35, note). A debt which can be levied upon under this section, must be a legal debt, and not an equitable demand; and it must be payable absolutely, and not upon a contingency; a mere contingent interest is not the subject of levy. (*Excelsior Co. v. Cosmopolitan Co.*, 80 Hun, 592; 154 N. Y. 772). Wages which are exempt from execution cannot be levied on by an attachment. (*McCullough v. Carragan*, 24 Hun, 157).

Sec. 3. How Property to be Attached.

Subdivision 1.—REAL PROPERTY.

A levy under a warrant of attachment must be made upon real property, by filing with the clerk of the county, where it is situated, a notice of the attachment, stating the names of the parties to the action, the amount of the plaintiff's claim as stated in the warrant, and a descrip-

tion of the particular property levied upon. The notice must be subscribed by the plaintiff's attorney, adding his office address; and must be recorded and indexed by the clerk, in the same book, in like manner, and with like effect, as a notice of the pendency of an action. (Co. Civ. Proc. § 649, subd. 1). To levy an attachment upon real property, it is not necessary that the sheriff enter upon the land, or even see it. Nothing more is required to be done by the officer, than some act with intent to make the property liable to the process; this will constitute a seizure, and create a lien against the debtor, and all claiming under him by title subsequently acquired, except *bona fide* purchasers and incumbrancers. The officer need not leave with the person in possession a certified copy of the warrant of attachment. (*Rodgers v. Bonner*, 45 N. Y. 379).

Subdivision 2.—PERSONAL PROPERTY CAPABLE OF MANUAL DELIVERY.

A levy under a warrant of attachment must be made upon personal property, capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, by taking the same into the sheriff's actual custody. He must thereupon, without delay, deliver to the person from whose possession the property is taken, if any, a copy of the warrant, and of the affidavits upon which it was granted. (Co. Civ. Proc. § 649, subd. 2). A policy of fire insurance under which a loss has occurred, is not an "instrument for the payment of money only" within the meaning of this section (*Trepagnier & Bros. v. Rose*, 15 App. Div. 393; *affd. on op. below*, 155 N. Y. 637); it seems that this phrase was meant to include only cases of negotiable instruments. (*Id.*). A levy upon property of this nature can be made only by the sheriff taking the property into his actual custody. (*Halben v. Reilly*, 9 Daly, 271). The requirement that the sheriff must deliver to the person, from whose possession the property is taken, a copy of the warrant, and of the affidavits upon which it is granted, is directory only; and a fail-

ure to comply with it is an irregularity, which does not destroy the effect of the levy, if otherwise valid. (*Adams v. Speelman*, 39 Hun, 35; S. C. on another appeal, 10 N. Y. Supp. 364; affd. without opinion, 124 N. Y. 666). Where the property is already in the hands of the sheriff, no formal levy or notice is necessary to subject it to the lien of the attachment. (*Wehle v. Conner*, 83 N. Y. 231). Where the property was on a vessel, and the sheriff demanded possession of the master, who to save time became a receiptor for it, the levy was held to be good, although the hatches were not opened, and the sheriff did not see the goods until their arrival at the port of destination. (*Taacks v. Schmidt*, 18 Abb. Pr. 307).

Subdivision 3.—OTHER PERSONAL PROPERTY.

A levy under a warrant of attachment, must be made upon other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same; or if it consists of a demand, other than as specified in subdivision two of section six hundred and forty-nine, with the person against whom it exists; or, if it consists of a right or share in the stock of an association or corporation, or interests or profits thereon, with the president, or other head of the association or corporation, or the secretary, cashier, or managing agent thereof. (Co. Civ. Proc. § 649, subd. 3). Under this section is included not only property which is in its nature incapable of manual delivery, but also that which has become so from its peculiar position, as where it is under pledge, or consignment, with advances made upon the property. (*Clark v. Goodridge*, 41 N. Y. 210, 214; *Warner v. Fourth Natl. Bk.*, 115 N. Y. 251; *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193). A levy upon such property must be made in the precise mode directed by the statute (*Hayden v. Nat. Bk. etc.*, 130 N. Y. 146); handing a copy of the warrant to the person in charge of the property, and a verbal notice is not sufficient. (*Clark v. Warren*, 7 Lans. 180; *Miles v. Brown*, 38 Super. 400). To make a levy on a debt due

from a corporation, the warrant and notice must be served on the managing agent; leaving the papers with a person, not the managing agent of the corporation, by whom they were sent to him by mail, was held not to be a good levy. (*Pardee v. Leitch*, 6 Lans. 303). To subject a judgment to the levy of an attachment, the warrant must be served on the judgment debtor; service on his attorney is not sufficient. (*Matter of Flandrow*, 84 N. Y. 1). The notice under this subdivision, showing the property which is attached, is sufficient if it specifies all property, debts and effects, and all rights and shares of stock, with all interests and profits thereon, of the defendant, which are in the possession, or under the control of the person upon whom the notice is served. (*O'Brien v. Mech. and Traders' F. Ins. Co.*, 56 N. Y. 52). It was said in that case, that the notice is only an act of caution to the individual upon whom it is served, intended to operate solely to prevent his paying the debt, or delivering the property to the debtor, and impounding it to answer the judgment; and it answers the purpose that the law contemplates, if it notifies the individual that a warrant of attachment has been issued against his creditor, or an owner of property in his possession, and that the sheriff claims to levy upon the debt owing by him, or the property in his possession; and notice by the sheriff that he attaches all property, debts and effects, and all rights and shares of stock etc., in the possession or under the control of the individual served, does show the property levied upon. A particular description of the property and debts supposed to be in the possession of or owing by him, is not necessary for the information of the party served, and would not more satisfactorily show to him the property intended to be reached; the individual served, necessarily knows better than the officer can know, the property and debts in his possession, or owing by him, subject to attachment. (*O'Brien v. Mech. & Traders' F. Ins. Co.*, *supra*). The rule laid down in the case last cited was departed from in the case of *Greentree v. Rosenstock* (61 N. Y. 583), where it was held that the property must be specifically

described, but that the departure was inadvertent seems apparent from the remarks of the court in *Hayden v. Nat. Bk.* (130 N. Y. 146); it is apprehended, therefore, that the statement of the rule, contained in the *O'Brien* case, is still authoritative. Mr. Throop says that the third subdivision of section six hundred and forty-nine was intended to settle the law as it was laid down in that case. A notice, endorsed on the copy of the attachment, that it was a true copy, and that all debts, credits and effects of the attachment debtor were liable thereto, and were attached, is good. (*McGinn v. Ross*, 33 Super. 346). Where the notice recites that a debt due a firm is levied upon, it does not operate to attach a debt due to one member of the firm. (*Greentree v. Rosenstock*, *supra*; *Hayden v. Nat. Bk.*, *supra*). Where a notice at the time of the levy, was not sufficient, a new notice after a suit has been brought upon a debt levied upon, does not cure the defect. (*O'Brien v. Mech. & Traders' F. Ins. Co.*, 36 Super. 110; reversed on another point, 56 N. Y. 52). If the warrant is not certified by the sheriff, the levy is not valid (*Courtney v. Eighth Ward Bk.*, 154 N. Y. 688); and in that case, the indorsement of the word "copy" on the back of the paper purporting to be a copy of the warrant, on another fold of which paper there was a notice signed by the sheriff, was held not to satisfy the statutory requirement as to certification. Attaching the signature of the sheriff to a certified copy of the attachment and the notice, is a merely ministerial act, and if done by a clerk and adopted by the sheriff, or a deputy, the levy is sufficient. (*Gibson v. National Park Bank*, 98 N. Y. 87). After an attachment has been served upon a debtor, he is bound to hold the debt subject to the lien of the attachment; and any payment which he makes to a third person is at his own risk. (*Duncan v. Berlin*, 60 N. Y. 151). The debtor in such a case has an active duty to perform, imposed upon him by the legal attachment of the debt; and he cannot escape liability when by his own inaction he allows the attached fund to be removed from his possession. It is the duty of the debtor in such case, to take immediate steps to impound

- the funds in his hands, and to prevent their payment by any of his agents, except to a *bona fide* holder of his obligations. He cannot shield himself from liability by alleging ignorance of the agent making the payment, while he, having authority, and owing a duty to act in the premises, has knowledge of the fact which makes such payment a violation of his duty. (*Gibson v. National Park Bank*, 98 N. Y. 87).

Subdivision 4.—UPON PROPERTY DISCOVERED IN AN ACTION UNDER SUBDIVISION 2 OF SECTION 655.

A levy under a warrant of attachment must be made upon any property discovered in any action brought as prescribed in subdivision two of section 655 of the code of civil procedure, by entering in the proper clerk's office, the judgment rendered in said action, and thereafter levying on said property in manner prescribed in subdivisions one, two and three of section 649.

Subdivision 5.—EFFECT OF THE ATTACHMENT.

The warrant of attachment does not bind the real estate of the debtor from the time of the delivery of the warrant to the sheriff; but from the time of making the levy. (*Burkhardt v. McClellan*, 15 Abb. Pr. 243, note; *Rodgers v. Bonner*, 45 N. Y. 379). The lien of the attachment dates from the time only of the seizure of the property under it (*Burkhardt v. Sanford*, 7 How. Pr. 329); and affects only that property which is seized upon the attachment, so that a junior attachment, if first levied, has priority. (*Van Camp v. Scarle*, 147 N. Y. 150). So, if an attachment has been actually levied, prior to the date of the appointment of the receiver, the latter takes subject to the lien (*Bennett v. Complete Elec. Construction Co.*, 8 App. Div. 301), but if the attachment has been issued only, and not levied, the receiver appointed at that juncture takes free from any lien of the attachment. (*Matter of Schuyler's Steam Tow Boat Co.*, 136 N. Y. 169; reversed on another point, *sub nom.*, *Moran v. Sturges*, 154 U. S. 256).

Although the attachment does not become a lien until levy, when a levy is made the lien attaches and enures to the benefit of the creditors in the order of their priority which is determined, according to sections 644, 697, 1406 and 1407 of the code of civil procedure, by the order of the delivery of the attachments to the sheriff. (*Gillig v. Treadwell Co.*, 148 N. Y. 177; Art. V of this chapter, *infra*). So where a sheriff attempted to levy three successive attachments on different parcels of property, the levies on behalf of the junior attachments were held to enure to the benefit of the attachment first delivered to the sheriff. (*Gillig v. Treadwell Co.*, *supra*). As we have seen in a previous section of this chapter, the levy of an attachment on choses in action by taking manual possession of them under subdivision two of section six hundred and forty-nine, does not change the character of the property, and does not give a lien which authorizes the sheriff to contest a prior transfer; and when the levy is effected through proceedings for the examination of a third person, it does not relate back to the time of the original demand of the sheriff, so as to set aside a transfer subsequent to the demand. (*Anthony v. Wood*, 96 N. Y. 180). Where a debt, which is sought to be levied upon, has been transferred before the levy, there is nothing which is subject to the lien of the attachment. (*Gibson v. National Park Bank*, 98 N. Y. 87). The maker of a negotiable security, which is evidence of a debt from him to the defendant, whose property has been attached, cannot be prevented from paying it to a *bona fide* holder. (*Bills v. National Park Bank*, 89 N. Y. 343; *Gibson v. National Park Bank*, 49 Super. 429). The exercise by the seller of goods of the right of stoppage in transitu, defeats an attachment on the goods as the property of the buyer. (*Clark v. Lynch*, 4 Daly, 83). Where the court has jurisdiction, an attachment is good until it is vacated; and it cannot be attacked, for insufficiency of the affidavits upon which it was granted, by the grantee of the defendant in a creditor's action to set aside the transfer of the attached property. (*Denman v. McGuire*, 101 N. Y. 161).

Subdivision 6.—CERTIFICATE AND EXAMINATION.

Upon the application of a sheriff holding a warrant of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a certificate under his hand, specifying the rights or number of shares of the defendant in the stock of the association or corporation, with all dividends declared, or incumbrances thereon; or the amount, nature and description of the property, held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires. (Co. Civ. Proc. § 650). Before a sheriff can require a certificate under this section, he must disclose the fact that he has an attachment. (*Schieb v. Baldwin*, 13 Abb. Pr. 469; 22 How. Pr. 278). The clerk of the court, with whom one has deposited money, may be compelled to give the certificate. (*Dunlop v. Patterson F. Ins. Co.*, 74 N. Y. 145). One who has property in his possession as receiver, cannot be compelled to make the certificate required by this section; the sheriff must rely on notice to the receiver of his lien. (*Lehman v. Williams*, 1 Law. Bull. 58). The certificate is not conclusive against the party making it; he is not estopped by it from showing the true amount which he owes to the defendant in the action. (*Almy v. Thurber*, 99 N. Y. 407; *Bank of Mut. Redemp. v. Sturgis*, 9 Bosw. 660). Nor does the certificate affect the right of other creditors, who, before it was given, have acquired the right to have the goods of the defendant, in the hands of the person making the certificate, applied to pay their debts. (*Bank of Mut. Redemp. v. Sturgis, supra*).

If a person to whom application is made, as prescribed in section six hundred and fifty, refuses to give such a certificate; or if it is made to appear, by affidavit, to the satisfaction of the court, or a judge thereof, or the

county judge of the county to which the warrant is issued, that there is reason to suspect that a certificate given by him is untrue, or that it fails to fully set forth the facts, required to be shown thereby; the court or judge may make an order, directing him to attend at a specified time, and at a place within the county to which the warrant is issued, and submit to an examination under oath, concerning the same. The order may, in the discretion of the court or judge, direct an appearance before a referee named therein. (Co. Civ. Proc. § 651). Where the attachment and the certificates, served on the person alleged to have property of the debtor, and the sheriff's certificate of such service have been filed with the clerk, and are referred to in the affidavit made upon an application for an order under this section, and are stated to be papers upon which such application is based, they may properly be considered as part of the moving papers, on which the order for an examination is granted. (*Matter of Crary*, 9 Civ. Pro. Rep. 168). A person can be required to be examined under this section, only where he refuses to give a certificate, or where it is made to appear that the certificate given by him is untrue, or fails fully to set forth the facts. Where he gives the only certificate which he can give, there is no authority for an examination under this section. (*Reynolds v. Fisher*, 48 Barb. 146). Where the motion for an examination is based upon the ground that no certificate has been given, it will not be granted if a defective certificate had been given. (*Gray v. Solis*, 2 Law. Bull. 12). A refusal to give a certificate does not suspend further action upon an attachment, nor does it prevent a levy by the sheriff. (*O'Brien v. Mechanics & Traders' F. Ins. Co.*, 56 N. Y. 52). The examination under this section may be allowed after judgment. (*Smoot v. Heim*, 1 Civ. Proc. Rep. 208). Where a certificate has been given, an order for an examination should not be granted, in the absence of an affidavit contradicting the certificate that the person has no property, or against his own affidavit supporting the certificate. (*Ives v. Lockwood*, 65 How. Pr. 518). The order for examina-

tion will not be vacated, against a debtor himself, on affidavit that the funds are held in trust, and not applicable to the payment of the attachment debt; the creditor is entitled to an examination, and he is not bound to take the statement of the debtor of the manner in which he holds the debt. (*Baxter v. Mo. Kan. & T. R. R. Co.*, 4 Hun, 630). The party examined cannot put an end to his examination by a simple denial that he has property of the defendant, or that he is indebted to him. The sheriff is entitled to a further examination to determine, as he must at his peril, whether the party really has property of, or is indebted to, the defendant. (*American Distributing Co. v. Distilling and Cattle Feeding Co.*, 24 Civ. Proc. Rep. 245). The party must show his title; and if he has papers to prove it, they must be produced if they are demanded. (*Rutter v. Boyd*, 3 Abb. N. C. 6; *Guinan v. Allen*, 40 App. Div. 137). He can be required to answer any question, which can in any manner bear upon the question as to whether the judgment debtor has property or rights in action, which ought to be subjected to the payment of the judgment; he must state facts upon such points as are necessary to be known by the sheriff, to enable him to take such action as the law requires under the attachment. And the sheriff is entitled to have a party answer all pertinent questions, bearing upon the fact whether he has property of the defendant, or owes him a debt. (*Matter of Crary*, 9 Civ. Proc. Rep. 168). If it is alleged that the debtor has assigned to the person examined, the consideration of the assignment may be inquired into. The object of the examination is not to try the title of the witness, but to ascertain the character and extent of that title. (*Glen Cove Starch Mfg. Co. v. Gotthold*, 1 Civ. Proc. Rep. 366, note; 1 Law. Bull. 42). After the examination is had, the remedy is exhausted, and the court cannot order a certificate to be given (*Buckingham v. White*, 25 Hun, 441); nor can the court after an examination, by an order, compel the delivery of the property to the sheriff. The only remedy of the sheriff is an action or proceeding to reduce such property to his possession,

which must be instituted in his name, or in that of the debtor. (*Hall v. Brooks*, 89 N. Y. 33).

Sec. 4. Rights of Master or Owner of Vessel.

Except as otherwise prescribed in section six hundred and fifty-three, the owner or master of a vessel, on board of which goods of a defendant, against whom a warrant of attachment is issued, have been shipped for transportation, without reshipment or transshipment in the state, to a port or place without the state, may transport and deliver them according to their destination, notwithstanding the warrant; unless the plaintiff, his agent or attorney, executes to the owner or master of the vessel, a written undertaking with sufficient sureties, in a sum specified therein, to pay him all expenses, damages and charges, which may be incurred by him, or to which he may be subjected, for unloading the goods from the vessel, and for all necessary detention of the vessel for that purpose. The undertaking must be approved, with respect to its form, the sum specified therein, and the sufficiency of the sureties, by a judge of the court, or the county judge of the county wherein the vessel is situated, or, in the city and county of New York, by a justice of the supreme court. (Co. Civ. Proc. § 652). If the sheriff takes goods from a common carrier without giving a bond, he is a trespasser, and he is liable for the full value of the goods. (*Campbell v. Conner*, 70 N. Y. 424). Section six hundred and fifty-two, does not apply, where the owner or master, before the shipment of the goods, had actual information of the granting of the warrant, or where he has in anywise, connived at, or been privy to, the shipment thereof, for the purpose of screening them from legal process, or of hindering, delaying, or defrauding creditors. (Co. Civ. Proc. § 653).

Sec. 5. Inventory.

The sheriff must, immediately after levying under a warrant of attachment, make, with the assistance of two disinterested freeholders, a description of the real property, and a just and true inventory of the personal

property, upon which it was levied, and of the books, vouchers and other papers taken into his custody, stating therein the estimated value of each parcel of real property attached, or of the interest of the defendant therein, and of each article of personal property, enumerating such of the latter as are perishable. The inventory must be signed by the sheriff and the appraisers; and must within five days after the levy, be filed in the office of the clerk of the county where the property is attached. (Co. Civ. Proc. § 654). A failure to make an inventory does not impair or invalidate the levy, if it is otherwise sufficient. (*McGinn v. Ross*, 33 Super. 346). An inventory need not be made immediately after the levy, nor even on the same day. The requirement as to the time when it shall be made is directory merely. (*Greenleaf v. Mumford*, 30 How. Pr. 30). The court may permit it to be amended, by inserting a description of the land levied on, which has been omitted by mistake, or correct any other mistake. (*Vanderheyden v. Gary*, 38 How. Pr. 367; *Dunn v. Arkenburgh*, 48 App. Div. 518; *affd. on op. below*, 165 N. Y. 669). Upon the application of either party, and proof of the neglect of the sheriff, the court or judge may, by order require the sheriff to return an inventory. Disobedience to such an order may be punished, as a contempt of the court. (Co. Civ. Proc. § 681).

Sec. 6. Action by Sheriff and Attaching Creditor.

1. The sheriff must, subject to the direction of the court or judge, collect and receive all debts, effects and things in action, attached by him. He may maintain any action or special proceeding, in his own name, or in the name of the defendant, which is necessary for that purpose, or to reduce to his actual possession an article of personal property, capable of manual delivery, but of which he has been unable to obtain possession, and he may discontinue such an action or special proceeding, at such time, and on such terms as the court or judge directs.

2. Where the summons was served without the state, or by publication, pursuant to an order obtained for

that purpose, as prescribed in chapter fifth of the code of civil procedure; and where the defendant has not appeared in the action (otherwise than specially) but has made default and before entering final judgment, the sheriff may in aid of said attachment, maintain an action against the attachment debtor, and any other person or persons, or against any other person or persons to compel the discovery of any thing in action, or other property belonging to the attachment debtor; and of any money, thing in action, or other property due him, or held in trust for him, or to prevent the transfer thereof, or the payment or delivery thereof, to him, or any other person, and the sheriff may, in aid of said attachment, also maintain any other action against the attachment debtor and any other person or persons, or against any other person or persons, which may now be maintained by a judgment creditor in a court of equity, either before the return of an execution, in aid thereof, or after the return of an execution unsatisfied. The judgment in any of the above-mentioned actions must provide and direct that the said property shall be applied by the sheriff, to the satisfaction of any judgment which the plaintiff may obtain in the attachment action. (Co. Civ. Proc. § 655). The plaintiff, by leave of the court or judge, procured as prescribed in the next section, may bring and maintain, in the name of himself and the sheriff jointly, by his own attorney and at his own expense, any action which, by the provisions of title three of chapter seven of the code of civil procedure, may be brought by the sheriff, to recover property attached, or the value thereof, or a demand attached, or upon an undertaking given as prescribed in this title, by a person other than the plaintiff; the plaintiff, in his own name and the sheriff's jointly, may also bring and maintain any action which, by the provisions of subdivision two of section 655 of the code of civil procedure, may be brought by the sheriff. The sheriff must receive the proceeds of such an action, but he is not liable for the costs or expenses thereof. Costs may be awarded, in such an action, against the plaintiff in the warrant, but not

against the sheriff. (Co. Civ. Proc. § 677). The court or judge must grant leave to bring such an action, where it appears that due notice of the application therefor has been given to the sheriff; but, before doing so, the court or judge may require that notice of the application be given to the plaintiff, in any other warrant against the same defendant. And such terms, conditions, and regulations may be imposed, in the order granting leave, as the court or judge thinks proper, for the due protection of the rights and interests of all persons, interested in the disposition of the proceeds of the action. (Co. Civ. Proc. § 678). Leave may, in like manner and with like effect, be granted to the plaintiff in the warrant, to be joined with the sheriff, in an action brought by the sheriff, in a case where he might have procured leave to bring the action as prescribed in sections six hundred and seventy-seven and six hundred and seventy-eight. Upon an application therefor the court or judge may, in a proper case, require the plaintiff to provide for the expenses of the action, already incurred by the sheriff. The application must be denied in case of an unreasonable delay in making it; or where an application was made before the action was brought, and the plaintiff neglected or refused, without a good excuse therefor, to comply with the terms, conditions, or regulations then imposed. (Co. Civ. Proc. § 679). The court or judge, may upon the application of the sheriff, or of the defendant in the warrant, during the pendency of an action, brought as prescribed in sections six hundred and seventy-seven, six hundred and seventy-eight, and six hundred and seventy-nine, direct as to the conduct, discontinuance, or settlement of the same, and as to the application or disposition of the money or property recovered therein, as justice requires. (Co. Civ. Proc. § 680). The action, provided for by these sections, may be brought before a suit in which the attachment was issued has been determined. (*Davidson v. Chatham Nat. Bank*, 32 Hun, 138). In an action brought by the sheriff and the plaintiff jointly, under section 677, the defendants cannot object that the sheriff had no notice of the application for leave to bring the

action; the code provision in this respect is for the sole benefit of the sheriff. (*Dunn v. Arkenburgh*, 48 App. Div. 518; *affd.* on *op.* below, 165 N. Y. 669). The sheriff can only bring an action under these sections to collect and receive debts, effects and things in action, which have been attached by him (*Maxfield v. Taylor*, 20 Wk. Dig. 121; *Bowe v. Arnold*, 31 Hun, 256; *affd.* on *op.* below, 101 N. Y. 652); or to prevent the distribution of the proceeds of attached property, until the conflicting rights of different claimants can be settled by the courts. (*Bates v. Plonsky*, 28 Hun, 112; *Bowe v. Arnold*, *supra*). The sheriff cannot maintain an action, under these sections, in aid of the attachment, where a general execution—not one against the attached property as required by section 1370 of the code of civil procedure—issued after the recovery of the judgment; the issuance of the general execution is a waiver of whatever right was acquired by virtue of the attachment and levy. (*Dunn v. Acker*, *Merrall v. Condit*, 26 Misc. 758; *Peetsch v. Sommers*, 31 App. Div. 255). He cannot sue to set aside, as fraudulent, an assignment of attached property, whether it be a chose in action, or property capable of delivery (*Bowe v. Arnold*, *supra*), unless the right is given him by subdivision two of section 655, which was added by chapter 504 of the laws of 1889 (*Whitney v. Davis*, 148 N. Y. 256), or unless there are some peculiar circumstances, such as were presented in *People ex rel Cauffman v. Van Buren* (136 N. Y. 252), sufficient to justify the interference of equity. If, however, the sheriff has taken into his possession under the attachment, property capable of manual delivery, and his seizure is attacked by one claiming as vendee of the defendant, the sheriff may defend by showing that the title of the vendee is fraudulent as to creditors. (*Rinchey v. Stryker*, 28 N. Y. 45). In actions brought by the sheriff in aid of an attachment, a prior assignment of it, although it was made to defraud creditors was a complete defense (*Anthony v. Wood*, 96 N. Y. 180, 185; *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83), prior to the amendment, of 1889, to section 655, except in the very rare and exceptional cases like *People*

ex rel Cauffman v. Van Buren (*supra*), where equity would intervene. That amendment, however, permits a suit to set aside the transfer to be based upon the attachment alone, only in the cases specified in subdivision two, thereby added to the section. The object of this amendment is to enable a creditor to reach the fraudulently assigned property of a non-resident debtor, who has not appeared in the action (*Harding v. Elliott*, 91 Hun, 502), so the complaint, in the action to set aside the transfer, must show that the defendant has not appeared, but has made default in the attachment action. (*Butcher v. Pearson*, 43 App. Div. 468; *affd.* without op. 161 N. Y. 625). In cases which are not within subdivision two of section 655, the rule laid down in *Anthony v. Wood* (*supra*), is still applicable. (*Id.*). Of course, after judgment the action to set aside the fraudulent transfer may be brought by the judgment creditor. (*Id.*). By section two hundred and thirty-eight of the code of procedure, the plaintiff in the attachment might bring such actions as the sheriff was authorized to bring, upon the delivery by him to the sheriff, of an undertaking as therein directed; but section six hundred and seventy-seven of the code of civil procedure, and the two following sections, are substituted for section two hundred and thirty-eight of the code of procedure; and the cases which have been decided as to the effect of section two hundred and thirty-eight are now obsolete, and no longer important. The defendant, in an action brought under these sections, cannot attack the attachment because of the insufficiency of the affidavits, where the court has obtained jurisdiction of the judgment debtor (*Brown v. Guthrie*, 39 Hun, 29; modified on other points, 110 N. Y. 435); but such defendant may attack the validity of the attachment as that is a condition precedent to the maintenance of the action. (*Ross v. Ingersoll*, 53 App. Div. 86). In such an action, the defendant is not estopped from showing the actual amount due, by the statement of it made in the certificate which he has furnished. (*Almy v. Thurber*, 99 N. Y. 407). An action brought under these sections, is the only remedy by the sheriff to collect the debts, or to reduce the prop-

erty of the attachment defendant to his possession. (*Hall v. Brooks*, 89 N. Y. 33).

Sec. 7. Care of the Property.

The sheriff must keep the property attached by him, or the proceeds of property sold, or of a demand collected by him, to answer any judgment that may be obtained against the defendant in the action. (Co. Civ. Proc. § 674). But the court, upon the application of either party to the action, may direct the sheriff, either before or after the expiration of his term of office, to pay into court the proceeds of a demand collected, or property sold; or to deposit them in a designated bank or trust company, to be drawn out only upon the order of the court. (Co. Civ. Proc. § 675). The last section changes the rule which was laid down in *Dodge v. Porter* (8 Bosw. 696). The sheriff's lien, which he acquires by a levy of an attachment, constitutes a special title, and authorizes him to hold possession until the attachment is vacated, or until judgment is rendered in the action, and the property seized upon the attachment has been sold upon an execution. (*Rhoads v. Woods*, 41 Barb. 471). Where the sheriff had received the rents of real estate, which he had attached, the court ordered the rents to be paid upon incumbrances, it appearing that the security to the plaintiff by the levy was sufficient to pay the debt. (*Fitzgerald v. Blake*, 28 How. Pr. 109). Where he has taken property, and also taken possession of books pertaining to the business, he has no right to submit them to the examination of the plaintiff, nor to experts coming in behalf of the plaintiff, nor to examine them himself, except for the pure purpose of his trust, and only as is necessary to execute the process; but he should allow the defendants, their agents, or assignees, to examine them at reasonable times. (*Garden v. Sabey*, 10 Wk. Dig. 33; *Hergman v. Dettlebach*, 11 How. Pr. 46; see, however, *Brooke v. Foster*, 20 Abb. N. C. 200). If money or property, which has been attached, is lost during the pendency of the action without fault of the plaintiff, it is not regarded as paid to be applied upon the plaintiff's judgment, but the defend-

ant must bear the loss. (*McBride v. Farmers' Bank of Salem*, 28 Barb. 476; *affd.* 24 How. Pr. 611, note). Where the proceeds of the property sold, and of the demands collected by the sheriff, exceed the amount of the plaintiff's demand, with the costs and expenses, and of all other warrants of attachment or executions in the sheriff's hands, chargeable upon the same; the court, or the judge who granted the warrant, upon the application of the defendant, or of an assignee of, or purchaser from the defendant, and upon notice to the plaintiff, and the plaintiffs in the other warrants or executions, may at any time during the pendency of the action, make an order, directing the sheriff to pay over the surplus to the applicant, and to release from the attachment the remaining real and personal property attached. (Co. Civ. Proc. § 676). Where the damages claimed were ten thousand dollars, it was held proper to release all property levied upon, in excess of twelve thousand dollars in value. (*Hall v. Ledlie*, 2 Law. Bull. 61). The fact that an attachment has been granted by the courts of another state upon the same debt, is not to be considered upon an application for a warrant. Yet, where it appears that such an attachment has been granted, and property has been levied upon under it, that fact will be considered upon an application under this section, for the release of a portion of the property levied upon in this state; and the plaintiff will be allowed to attach only so much property in this state, as is necessary to secure the additional amount claimed here, unless he will stipulate to abandon his levy in the other state. (*Trubee v. Alden*, 6 Hun, 75). If property attached, other than a vessel, is perishable, the court or judge may, by an order made with or without notice, as the urgency of the case in its or his opinion requires, direct the sheriff to sell it at public auction, and thereupon the sheriff must sell it accordingly. If it consists of live animals, the same proceedings may be had, but such notice shall be given to the parties to the action, of the application for the order, as the court or judge prescribes. The order directing the sale must prescribe the time and place of the sale, and notice

thereof must be given in such manner, and for such time as is prescribed in the order. The sheriff must retain in his hands the proceeds of the sale, after deducting his expenses as allowed by the court or judge. (Co. Civ. Proc. § 656). Perishable property is only that which is inherently liable to deterioration and decay. (*Fisk v. Spring*, 25 Hun, 367; 1 Civ. Proc. Rep. 378). It has been defined in Michigan, to mean property perishable in its own nature and character, and not that which is or may be subject or liable to loss by trespass, larceny, or fire. (*Oncida National Bank v. Paldi*, 2 Mich. N. P. 221). The following property has been ordered to be sold as perishable: potatoes (*Davis v. Ainsworth*, 14 How. Pr. 346); fruit, grain, fresh fish, liquors (1 Civ. Proc. Rep. 390, note); kid gloves. (*Fisk v. Spring*, 1 Civ. Proc. Rep. 378, 383). The fact that property which has been attached, is likely to depreciate in value, because of changes in styles and fashions, does not make it perishable, so as to authorize the court to sell it under this section. (*Fisk v. Spring*, *supra*). The rule laid down in that case has been criticised as being too narrow. (*Schumann v. Davis*, 13 N. Y. Supp. 575).

Sec. 8. Claim of Property.

If goods or effects, other than a vessel, attached as the property of the defendant, are claimed by or in behalf of another person, as his property, the sheriff may, in his discretion, empanel a jury to try the validity of the claim. (Co. Civ. Proc. § 657). The manner of trying a claim of property under this section is laid down in section one hundred and eight of the code of civil procedure; which it is not necessary to cite in full at this place. If, by their inquisition, the jury find the property of the goods or effects to have been in the claimant, at the time of the levy, the sheriff must forthwith deliver them to him or his agent; unless the plaintiff gives an undertaking, with sufficient sureties, to indemnify the sheriff for the detention thereof. If the undertaking is given, the sheriff must detain the goods or effects, as the property of the defendant. Where

an undertaking is given to indemnify the sheriff, he must, within two days after the giving of the said undertaking, cause the same to be filed in the office of the court out of which the attachment was issued, and serve upon the claimant or his agent, and the attaching creditor or attorney, whose name is subscribed to the warrant of attachment, a copy of the said undertaking, with a notice of the justification of the sureties thereon. The justification must take place before a judge of the court out of which the attachment was issued, at a time to be specified in the notice, which must not be less than two nor more than five days after the serving of the said notice. For the purpose of justification each of the sureties upon the undertaking must attend before the judge at the time and place mentioned in the notice, and be examined on oath on the part of the claimant, or his agent or attorney, touching his sufficiency, in such manner as the judge in his discretion thinks proper. The examination may be adjourned from day to day until it is completed, but such adjournment must always be to the next judicial day. If required by the claimant, his assignee or other representative, the examination must be reduced to writing and subscribed by the sureties. If the judge finds the sureties sufficient he must annex the examination to the undertaking, indorse his allowance thereon and cause the said undertaking, together with the examination of the sureties, to be filed with the clerk of the court. Thereupon the sheriff is released and discharged from all further liability, by reason of the taking and detention of the property seized. When any such undertaking shall have been approved and filed, as hereinbefore provided, the clerk of the court in which the same shall be filed shall immediately index the same in the general index book in his office under the title of the suit in which the attachment is issued. (Co. Civ. Proc. § 658). If the sheriff detains the property attached after a finding for the claimant, he is liable on his official bond if judgment has been recovered against him. (*People v. Schuyler*, 4 N. Y. 173). If the property is found to be in the defendant, the finding does

not prejudice the right of the claimant, to bring an action to recover the goods or effects, or the value thereof. (Co. Civ. Proc. § 659).

Sec. 9. Proceedings on Claim of Vessel.

Where a vessel, belonging to a port or place in the United States, or a share or interest therein, is attached, the court or judge, on the application, within thirty days thereafter, of a person claiming title thereto, or of his agent, must appoint three indifferent persons to make a valuation thereof. (Co. Civ. Proc. § 660). A valuation of a vessel, or of a share or interest therein, made as prescribed herein, must be in writing, and subscribed by the appraisers; each of whom must take and subscribe an affidavit, annexed thereto, to the effect that the valuation is, in all respects, just and fair, and that the value of the vessel, share, or interest, is truly stated therein, according to the deponent's belief. The valuation must be immediately returned to the court or judge; and, after an undertaking is given, or after the expiration of the time to give an undertaking, as prescribed in section six hundred and sixty-two, it must be delivered to the sheriff. (Co. Civ. Proc. § 661). Within two days after the valuation is returned, the claimant or his agent, may execute an undertaking to the sheriff, with sufficient sureties, approved by the court or judge, who must justify in twice the appraised value, to the effect, that, in an action to be brought on the undertaking, the claimant will establish that he was the owner of the vessel, share, or interest, at the time of the levy thereupon; and that in case of his failure to do so, he will pay the amount of the valuation, with interest from the date of the undertaking, to the sheriff; or if the warrant is vacated or annulled, to the defendant, or his personal representative. (Co. Civ. Proc. § 662). The failure to procure more than one surety to an undertaking does not invalidate the bond given under this section. (*Ward v. Whitney*, 8 N. Y. 442; Co. Civ. Proc. § 811). Upon such an understanding being executed and delivered to the sheriff, the court or judge must make an order, directing the vessel or share to be dis-

charged from the attachment. Thereupon the sheriff must discharge the same accordingly. (Co. Civ. Proc. § 663). The court or judge may, upon the application of either party, at any time before the warrant is vacated or annulled, direct the sheriff to commence an action upon the undertaking, upon such terms and conditions, and under such regulations, between him and the applicant, as it or he deems just. And if the warrant of attachment is vacated or annulled, the defendant in the attachment, his assignee or personal representative, may commence and maintain an action upon the undertaking, or may be substituted in place of the sheriff, in an action pending thereupon. (Co. Civ. Proc. § 664). In such an action, the claimant may show, in bar of recovery, that he was the owner of the vessel, share, or interest, at the time when it was attached. If judgment passes against him, the plaintiff is entitled to recover the amount of the valuation, with interest from the date of the undertaking. (Co. Civ. Proc. § 665). Where a foreign vessel, or a share, or interest therein is attached, it must be valued, as prescribed in sections six hundred and sixty, and six hundred and sixty-one, of the code of civil procedure (*supra*), upon the application of a person, who makes affidavit, to the effect that he is the owner thereof, or that he is the agent of a person, naming him and his residence, whom he believes to be the owner of the vessel, share, or interest attached. (Co. Civ. Proc. § 666). Such notice of the application must be given to the plaintiff, as the court or judge deems reasonable. (Co. Civ. Proc. § 667). Within three days after the valuation is returned, the plaintiff must give, to the person in whose behalf the claim is made, an undertaking, with sufficient sureties, approved by the court or judge, who must justify in twice the appraised value, to the effect that they will pay such damages, as may be recovered for seizing the vessel, share, or interest, in an action brought against the sheriff, or the plaintiff in the attachment, within three months from the approval of the undertaking, if it appears therein that the vessel, share, or interest

belonged, at the time of attaching it, to the person in whose behalf the claim is made. (Co. Civ. Proc. § 668). Unless such an undertaking is given, the court or judge must grant an order discharging the vessel, share, or interest so claimed, from the attachment; whereupon the sheriff must discharge the same accordingly. (Co. Civ. Proc. § 669). If, after such an undertaking is given by the plaintiff, the warrant is vacated or annulled, or the attachment is discharged as to the vessel, share, or interest, the defendant or his agent is entitled to claim the same, or the proceeds thereof, if it has been sold, only upon his showing to the satisfaction of the court or judge, that the undertaking has been discharged; or giving to the plaintiff an undertaking, with sufficient sureties, approved by the court or judge, who must justify in twice the appraised value, to the effect that they will indemnify the plaintiff against all charges and expenses, in consequence of the undertaking. (Co. Civ. Proc. § 670). If the undertaking of the plaintiff is not discharged, or he is not indemnified, as prescribed in article two, of title three of chapter seven, within one month after the defendant becomes entitled to claim the vessel, share, or interest, as so prescribed, it may be sold by the sheriff, in whose custody it is, upon an order of the court or judge; and the proceeds of the sale must be paid to the persons who executed the undertaking, for their indemnity. (Co. Civ. Proc. § 671). If a claim is not made, by or in behalf of an owner of a domestic vessel, or of a share or interest therein, within thirty days after it is attached, or if the proper undertaking is not executed by the claimant; or if a claim is not made within that time, by or in behalf of the owner of a foreign vessel, or of a share or interest therein; the vessel, share, or interest, may be sold by the sheriff, under an order of the court or judge, upon the application of the plaintiff, if, in the opinion of the court or judge, a sale is necessary. (Co. Civ. Proc. § 672). Where a share or interest in a vessel, foreign or domestic, is attached, if the proper claim to it is not made, by or in behalf of an owner thereof, within thirty days thereafter, it may be sold by the sheriff, under an

order of the court or judge, upon the application of a joint owner, or his agent. (Co. Civ. Proc. § 673).

ARTICLE IV.

VACATING AND MODIFYING WARRANT.

SECTION.

1. Who may move and when.
2. How motion may be made.
3. New proof.
4. When more than one motion allowed.
5. Grounds upon which the attachment will be vacated.
6. Effect of vacating attachment.
7. Application for discharge of property.

Sec. 1. Who may Move and When.

The defendant, or a person who has acquired a lien upon, or interest in, his property, after it was attached, may, at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together, or in the alternative. (Co. Civ. Proc. § 682). Under the code of civil procedure, the right of the defendant to move to vacate or modify the attachment is absolute; and suggestions, which have been made in certain cases, decided under the provisions of the code of procedure, that one could not move unless he was in some way aggrieved by the warrant, are not now the law. Under the code of procedure it was well settled that no one could move to vacate or modify the warrant of attachment, for irregularity, unless he was a party to the action. (*Tracy v. First Nat'l Bank of Selma*, 37 N. Y. 523; *Matter of Griswold*, 13 Barb. 412). The code of civil procedure has changed this rule. (*Jacobs v. Hogan*, 85 N. Y. 243). The defendant, or all of the defendants to the action, may in all cases move to vacate or modify the warrant. If there is more than one defendant, one of several defendants may move to the extent of his interest, and when the action

is against partners, one of the several defendants may move to vacate the warrant entirely. (*Walts v. Nichols*, 32 Hun, 276). Any person who has a lien or interest in the property, subsequent to the warrant of attachment, may now move to vacate it (*Steuben Co. Bank v. Alberger*, 75 N. Y. 179); if his interest or lien is only to a part of the property which has been attached, he may move to vacate the attachment as to that part. (*Trow's Printing Co. v. Hart*, 85 N. Y. 500). The lienor has no standing in court, however, unless he establishes the existence of a valid outstanding lien, which he could enforce against the property of the defendant if the warrant should be set aside. Where a lien, therefore, is in the form of a judgment of a court of limited jurisdiction, the facts must be set forth by affidavit, showing that such court had jurisdiction. (*Hammerschlag v. Cathoscope Elec. Co.*, 16 App. Div. 185; *Sill Stove Works v. Scott*, 62 App. Div. 566). So a junior attaching creditor cannot move unless a levy has been made under his attachment. (*Burtis v. Dickinson*, 81 Hun, 343). A judgment creditor, who has acquired a lien upon the attached property, by the recovery of a judgment and issue of an execution, is a subsequent lienor, and entitled to move, under the provisions of this section. (*Ruppert v. Haug*, 87 N. Y. 141). The interest which a receiver of a corporation has acquired in the property of the corporation, after the levy of an attachment, is such an interest as entitles him to move to vacate the warrant. (*National Shoe & Leather Bank v. Mechanics' Nat'l Bank*, 89 N. Y. 440). So an assignee of the owner of property levied on under an attachment, can move to vacate the warrant, (*Merriam v. Wood & Parker Co.*, 19 App. Div. 327), or the levy. (*Marx v. Ciancimino*, 59 App. Div. 570). Of course, it must appear in all cases that the assignment was made after the property was attached. (*Key West Bldg. etc. Ass'n v. Bank of Key West*, 45 N. Y. St. Rep. 152). But an assignee for the benefit of creditors is precluded from moving, without leave, where his assignor has moved and his motion been denied. (*Strauss v. Vogt*, 23 Civ. Proc. Rep. 251). A motion

which is made by a lienor, may be based upon the insufficiency of the papers upon which the warrant was granted (*Steuben Co. Bank v. Alberger*, 75 N. Y. 179); or upon any other ground upon which the defendant may move to vacate the warrant. The defendant is not precluded from making a motion to vacate, because a third person claims the attached property, and has given a bond of indemnity to the sheriff upon taking the property. (*Whitelegge v. DeWitt*, 12 Daly 319). Where the real owner, however, has brought an action against the sheriff for conversion, he has elected to treat the sheriff as his debtor and is precluded from moving to set aside the levy. (*Marx v. Ciancimino*, *supra*). A defendant may move to vacate the warrant, although he has made a general assignment for the benefit of his creditors, whether such assignment was made before or after the levy of the attachment. (*Dickinson v. Benham*, 12 Abb. Pr. 158; 20 How. Pr. 343; *Brewer v. Tucker*, 13 Abb. Pr. 76). It is not necessary for the defendant to put in a general appearance in the action before making the motion. (*Manice v. Gould*, 1 Abb. Pr. N. S. 255). A person seeking to move to vacate the attachment, either as a subsequent lienor, or because he has acquired an interest in the attached property, may move by virtue of that relation only, and need not become a party to the suit. (*National Shoe & Leather Bank v. Mechanics' Nat'l Bank*, 89 N. Y. 440). A motion may be made by the defendant, although he has given an undertaking to obtain the release of the property, under section six hundred and eighty-eight of the code of civil procedure (*Garbutt v. Hanff*, 15 Abb. Pr. 189; *Lawlor v. Magnolia Metal Co.*, 2 App. Div. 552; app. dismissed, 149 N. Y. 591); or although judgment has been rendered in the action, and execution issued upon it. (*Bowen v. First Nat'l Bank*, 34 How. Pr. 408; *Parsons v. Sprague*, 30 Hun, 19; S. C., 3 Civ. Proc. Rep. 290). The mere levy under an execution is not such an actual application as to bar the right of the subsequent lienor to move; that language of the code in section six hundred and eighty-two means an actual and real application of the property or its proceeds, as distinguished

from a constructive one. While the property remains, before it has been actually transferred to the plaintiff, or in case of sale, before its proceeds have gone to him, it is possible for the court to control and determine the liens upon it, fixing their order and enforcing their payment, on the one hand, or discharging or removing them upon the other. No evil can result, unless from a delay which has in fact transferred the property or its proceeds, upon a lien fully and completely enforced. That evil was the one at which the provision of the section was aimed; and it does not exist where there is merely a levy, under which neither the property, nor its proceeds, have actually and in fact passed to the creditor. (*Woodmansee v. Rogers*, 82 N. Y. 88). A motion to vacate a warrant upon the ground of irregularity, must be made at the earliest practicable moment, or the delay in making it must be excused. A delay of twenty days after judgment and the issue of an execution is too long (*Lawrence v. Jones*, 15 Abb. Pr. 110); but this rule does not apply to a motion on the merits, and which affects a substantial right. (*Swezey v. Bartlett*, 3 Abb. Pr. N. S. 444).

Sec. 2. How Motion May be Made.

An application, specified in section six hundred and eighty-two, may be founded only upon the papers upon which the warrant was granted; in which case, it must be made to the court; or, if the warrant was granted by a judge out of court, to the same judge, in court or out of court, and with or without notice, as he deems proper. Or, it may be founded upon proof, by affidavit on the part of the defendant; in which case it must be made to the court, or if the warrant was granted by a judge out of court, to any judge of the court, upon notice. (Co. Civ. Proc. § 683). The word "defendant" used in this section, designates the party moving to vacate the warrant, whether he is a party or lienor. (*Steuben Co. Bank v. Alberger*, 75 N. Y. 179). Before the enactment of the code of civil procedure, the practice upon moving to vacate the warrant of attachment, as to the judge before whom the motion might be made, and as to when

the motion must be made to the court, was somewhat unsettled; but the provisions of the section above cited seem to settle and dispose of all the questions which were in doubt under the code of procedure.

Two classes of motions are provided for by this section: the first of which is to be made upon the papers upon which the attachment was granted. This motion may be made to the court at a special term, in which case the moving party becomes subject to the general practice as to notice, and time, and place of hearing; or to a judge, and in that event to the judge who granted the attachment, whether he is in court or out of court, and subject to his direction, whether the application shall be heard *ex parte*, or upon notice. (*Ruppert v. Haug*, 87 N. Y. 141, 144). On a motion of this kind the plaintiff is entitled to the benefit of all legitimate inferences from the facts shown. (*Stewart v. Lyman*, 62 App. Div. 182). Where a motion of this class is made by a lienor, the service of the notice of motion and the affidavit, showing the existence of the lien by virtue of which he acquires his right to move, is not new proof within the meaning of section six hundred and eighty-three. (*Steuben Co. Bank v. Alberger*, 75 N. Y. 179). The rule is the same where affidavits are used by a lienor for the purpose simply of excusing his delay in moving, or to show facts which entitle him to an order to show cause. (*Brewer v. Tucker*, 13 Abb. Pr. 76; *Trow's Printing Co. v. Hart*, 85 N. Y. 500). Where the motion is made solely upon the papers upon which the attachment is granted, the court has no power to allow an amendment of the affidavits to support the attachment, by supplying proof of a necessary fact, in respect to which the original papers were defective (*Buhl v. Ball*, 41 Hun, 61; appeal dismissed, 106 N. Y. 672), nor to consider pleadings served after the attachment had been obtained. (*Fox v. Mays*, 46 App. Div. 1). In a case, where a judge, after granting an attachment, made an *ex parte* order that an additional affidavit, presented by the plaintiff, should be attached to the original papers upon which the attachment was granted, and filed *nunc pro tunc*, it was held that the judge had no right to

allow such a thing to be done, and the plaintiff was not allowed to read that affidavit, on a motion made upon the papers, to vacate the attachment. (*Sutherland v. Bradner*, 34 Hun, 519). But where the motion is made upon the papers upon which the attachment was granted, if the plaintiff presents new affidavits, and reads them without objection, the court may consider them, and it is not error to act upon them (*Fisher v. Dougherty*, 42 Hun, 167); and the objection to them cannot be first raised on appeal. (*Kibbe v. Wetmore*, 31 Hun, 424). If the moving party introduces any proof however slight, beyond what is sufficient to show his lien and his standing in court, or to excuse his delay in moving, it is new proof, and the plaintiff will be permitted to support the warrant of attachment by new affidavits. (*Godfrey v. Godfrey*, 75 N. Y. 434; *Ives v. Holden*, 14 Hun, 402). Although, upon a motion made upon the papers, the plaintiff will not be permitted to introduce new proof, or to amend the affidavits upon which the attachment was issued, the court may, in its discretion, permit him to amend the warrant of attachment. (*Kibbe v. Wetmore*, 31 Hun, 424; *King v. King*, 59 App. Div. 128; *Sulzbacher v. Cawthra*, 14 Misc. 545; *affd. on op. below*, 148 N. Y. 755). The second class of motions, provided for in this section, is those which are made upon proof by and on the part of the defendant. These motions must be upon notice, and, if the warrant was granted by a judge out of court, they may be made to any other judge of the court; and under any circumstances they may be made to the court at special term.

Sec. 3. New Proof.

If the motion is founded on proof by affidavit on the part of the defendant, it may be opposed by new proof by affidavit, on the part of the plaintiff, tending to sustain any ground for the attachment recited in the warrant, and no other, unless the defendant relies upon a discharge in bankruptcy, or upon a discharge or exoneration, granted in insolvent proceedings; in which case the plaintiff may show any matter, in avoidance thereof, which he might show upon the trial. (Co. Civ. Proc. §

683). Any proof, however, unimportant, presented by the defendant for the purpose of attacking in any way the allegations in the plaintiff's affidavits, is new proof within the provisions of this section. The right of the plaintiff to oppose the motion by new proof, does not depend upon the directness or force of the allegations contained in the affidavits presented by the defendant; if the affidavits of the defendant are proof at all, the plaintiff may oppose them with new affidavits. (*Godfrey v. Godfrey*, 75 N. Y. 434; *West Side Bank v. Meehan*, 49 N. Y. St. Rep. 606). Where the attachment was issued upon affidavits only, and the motion to vacate was made upon the affidavits and the complaint, the complaint constitutes new proof, and the plaintiff is entitled to read additional affidavits. (*Ives v. Holden*, 14 Hun, 402). If the plaintiff proposes to read affidavits upon a motion, the objection that the defendant's affidavits are not new proof within this section, must be taken at the hearing, or it is waived. (*Godfrey v. Godfrey*, 75 N. Y. 434). It was held in *Yates v. North* (44 N. Y. 271), which was a case decided under the code of procedure, that the plaintiff in his new proof, was confined to answering the allegations of the defendant's affidavits; but such is not the law under the code of civil procedure. Where the plaintiff is entitled to use additional affidavits, because the defendant has based his motion upon new proofs, he is not confined to answering the affidavits of the defendant; but he may do that, and he may also give new proof, which will tend to sustain any ground for the attachment recited in the warrant, and no other. This provision of section six hundred and eighty-three, has received a very broad construction. On such a motion, where the defendants had shown that the period of credit allowed to them had not expired when the attachment was issued, the plaintiff was permitted by new proof to show that the debt was fraudulently contracted, and that he was therefore at liberty to bring his action, as though no credit had been given. (*Vietor v. Henlien*, 34 Hun, 562). Where an attachment was issued in an action to recover money loaned, and it did not appear what part

of the loan was due at the commencement of the action, and the affidavits on which the defendant moved denied the existence of the indebtedness, the plaintiff is at liberty to present new affidavits, showing the amount of the loan which was due at the commencement of the action. (*Coffin v. Stitt*, 5 Civ. Proc. Rep. 261). In the case of *Kibbe v. Wetmore* (31 Hun, 424), the attachment was issued upon the sole ground of the defendant's non-residence; and he moved to vacate it, on affidavits tending to show that he was in fact a resident; upon that motion, the plaintiff was permitted to read opposing affidavits, tending to show that the defendant had disposed of his property with intent to defraud his creditors, and it was held upon appeal that such affidavits were properly received; but the opinion of the court in that case shows that no objection was made at the hearing of the motion to the reading of those affidavits; although no particular stress seems to have been laid upon that point by the judge in delivering the opinion. On the hearing of a motion to vacate a warrant of attachment, the plaintiff may produce affidavits in support of it, which had been made in another action by different plaintiffs, against the same defendants, where it appears that such copies were used because of plaintiff's inability to obtain affidavits in such action from the person who had made them in the other action. (*Whitney v. Hirsch*, 39 Hun, 325).

Sec. 4. When More Than One Motion Allowed.

The denial of such an application does not prejudice a subsequent application, seasonably made, founded upon the failure of a complaint which had not been filed or served at the time of the former application, to set forth any of the causes of action mentioned in section six hundred and thirty-five and section six hundred and thirty-seven of the code of civil procedure. (Co. Civ. Proc. § 686). Although a party has moved to vacate an attachment upon the papers on which it was granted, and that motion has been denied, he may, yet, make a subsequent motion on affidavits. (*Thalheimer v. Hays*, 42 Hun, 93; *Hawkins v. Pakas*, 44 App. Div. 395). A

lienor, who has moved to vacate the attachment as to personal property, upon the ground that it was an obstruction to the enforcement of a judgment and execution, and has been defeated upon that motion, may afterwards make a second motion to vacate the same attachment, so far as it affects real estate, upon the ground that it is a cloud upon an alleged title to such real estate, acquired by him; and he may do this, although he might have moved on the second ground, when he made the first motion. (*Steuben Co. Bank v. Alberger*, 83 N. Y. 274).

Sec. 5. Grounds Upon Which the Attachment Will be Vacated.

An attachment is a provisional remedy of a very severe nature, and the statute providing for it is, therefore, construed strictly in favor of those against whom it is employed (*Penoyar v. Kelsey*, 150 N. Y. 77); the attachment should not be sustained, unless the affidavits are clearly sufficient for granting the warrant. (*O'Brien v. Carroll*, 1 Law Bull. 9). If the motion to vacate the attachment is made upon the papers upon which it was granted, the warrant will only be vacated, where the court has no jurisdiction to grant it, or where the affidavits utterly fail to show some fact, which is essential to authorize the granting of the warrant. (*Allen v. Meyer*, 7 Daly, 146; 73 N. Y. 1; *Steuben Co. Bank v. Alberger*, 78 N. Y. 252). Upon such a motion, the warrant will be vacated on a complaint containing several causes of action, upon one of which an attachment cannot be granted, although there are joined with it other causes of action, upon which it can be granted. (*Union Min. Co. v. Raht*, 9 Hun, 208). Defects in the affidavits used on an application for an attachment, which are not specified in a notice of motion to set aside the attachment, cannot be relied upon in support of the motion. (*Kloh v. N. Y. Fertilizer Co.*, 86 Hun, 266). The court will not pass upon the merits of the action, on a motion to vacate the attachment, if it is possible to avoid it (*Iselin v. Port Royal R. R. Co.*, 6 Wk. Dig. 130), and unless it is certain that the complaint is so defective, that the plaintiff cannot recover in the action, the motion to

vacate should be denied. (*Goodyear v. Coml. Fire Ins. Co.*, 58 App. Div. 611). So where the motion to vacate is made on affidavits denying the plaintiff's cause of action, it should be denied and the dispute left for determination at the trial (*Kirby v. Colwell*, 81 Hun, 385); but every allegation on which the attachment is granted, may be disproved upon a motion. (*Boscher v. Roullier*, 4 Abb. Pr. 396). Whenever any essential fact is successfully controverted, the attachment will be vacated. (*Van Allen v. Sampson*, 5 Wk. Dig. 288). Where it appears by the affidavits submitted on the motion, that the plaintiff could not have known the existence of certain facts which he swears to, the attachment will also be vacated. (*O'Reilly v. Freel*, 37 How. Pr. 272). Where the motion is made upon the ground of a defect in the attachment, or any other technical defect, it may be defeated by granting a cross motion to amend, upon such terms as the court shall see fit to impose. (*Bradley v. Parker*, 2 Law Bull. 21). An attachment will not be vacated, because of a failure to file the affidavits upon which it was granted. (*Brash v. Wielarsky*, 36 How. Pr. 253). A warrant of attachment against a non-resident, will not be vacated, because the property which has been attached under it belongs to a third person. (*McKinlay v. Fowler*, 67 How. Pr. 388; reversed on another point, 1 How. Pr. N. S. 282). The objection that the cause of action is barred by the statute of limitations, cannot be taken by affidavits, on motion to vacate the warrant. (*Plimpton v. Bigelow*, 29 Hun, 362). Where an attachment, which has been issued against a non-resident, is levied on partnership property, it should not be vacated on affidavits that the partnership is insolvent, and that for that reason the defendant had no interest in the property. (*Black v. Rodger*, 2 Law Bull. 12; *Buckingham v. Swczyk*, 25 Hun, 84).

Sec. 6. Effect of Vacating the Attachment.

Where the attachment has been vacated for irregularity, or for invalidity, and property has been levied upon and taken under it, the plaintiff is liable as a trespasser. (*Lyon v. Yates*, 52 Barb. 237; *Kerr v. Mount*,

28 N. Y. 659). But wherever the attachment has been regularly issued, it is a protection to the party, for what has been done under it while it was in force; although it has been afterwards set aside on motion, for error. (*Day v. Bach*, 87 N. Y. 56). Where an attachment has been vacated for irregularity, it is the duty of the sheriff to surrender the property attached, to the owner of it, upon reasonable demand, and if he refuses to do so, the obligors on the undertaking given to indemnify him on making the levy are not liable for a judgment recovered against him for such refusal. (*Bowe v. Wilkins*, 105 N. Y. 322). Vacating the attachment on affidavits, for error, does not exonerate the sureties on an undertaking to procure the discharge of property, which has been taken under it. To have that effect, the attachment must have been vacated because the court had no jurisdiction to grant it, or the order should declare that the undertaking is void. (*Bilderssee v. Aden*, 8 Abb. Pr. N. S. 171; S. C., 12 Abb. Pr. N. S. 324).

Sec. 7. Application for Discharge of Property.

Subdivision 1.—WHO MAY MAKE IT.

The defendant may, at any time after he has appeared in the action, and before final judgment, apply to the judge who granted the warrant, or to the court, for an order to discharge the attachment, as to the whole or a part of the property attached. (Co. Civ. Proc. § 687). The defendant only can move for the relief provided for in this section. Where there is more than one defendant, and less than all desire to join in the application, the mode of proceeding is prescribed in section six hundred and eighty-nine of the code of civil procedure. Under the code of procedure, it had been held that an application could not be made for a discharge of part of the property taken upon the attachment (*Royal Ins. Co. v. Noble*, 5 Abb. Pr. N. S. 54); but this rule has been changed by the section above quoted. The motion cannot be made after final judgment (*Spencer v. Rogers Loco. Works*, 13 Abb. Pr. 180; *Parsons v. Sprague*, 3 Civ. Proc. Rep. 290); nor during the pendency of an

appeal from the judgment. (*Wright v. Rowland*, 4 Keyes, 165). Where an application is made as prescribed in section six hundred and eighty-nine, at least two days' notice of it, with a copy of the affidavit, must be served on the plaintiff's attorney, who may oppose the application by proof, by affidavit, that one or more of the other defendants own or have an interest in the property. (Co. Civ. Proc. § 689). Where the application is made by a defendant, or all the defendants in the action, the court or judge to whom the application is made, may direct what notice shall be given, if any, and if notice is given, and the plaintiff does not appear, the application may be denied. (Co. Civ. Proc. § 696). At the time of the application, the defendant should present to the court or judge, to whom he applies, the undertaking provided for by section six hundred and eighty-eight and six hundred and eighty-nine, and should cause it to be approved by the judge or court, and should file it forthwith. The order discharging the attachment, should state whether it applies to the whole, or to a part of the property; and if only to a part, to what part; but it need not, ordinarily, contain directions as to the manner of the re-delivery of the property. (*Ellsworth v. Scott*, 3 Abb. N. C. 9). In view of the provisions of chapter 418, § 1, subd. 2, of the Laws of 1892, it is advisable, in the county of New York, to give the sheriff notice of the application to discharge the attachment, to the end that the question of his fees and poundage may be settled upon the motion. (*Tribune Ass'n v. Eisner & Mendelson Co.*, 49 App. Div. 141).

Subdivision 2.—UNDERTAKING.

Upon such an application, the defendant must give an undertaking, with at least two sufficient sureties, to the effect that he will, on demand, pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding the sum specified in the undertaking, with interest. The sum so specified must be at least equal to the amount of the plaintiff's demand, as specified in his affidavit; or, at the option

of the defendant, equal to the appraised value, according to the inventory, of the property attached; or, if the application is to discharge the attachment, as to a part only of the property attached, to the appraised value of that portion. (Co. Civ. Proc. § 688). An undertaking given under this section should not be acknowledged, nor should the sureties justify before the defendant's attorney; and if they do so, the undertaking will not be approved. (*Bliss v. Molter*, 8 Abb. N. C. 241). The section, and an undertaking in its words, provide for the payment of interest by the sureties only from the time of the recovery of the judgment, not from the date of the undertaking. (*Sooysmith & Co. v. Am. Surety Co.*, 28 App. Div. 346). No consideration is necessary to uphold the undertaking which is given under this section. (*Bildersee v. Aden*, 62 Barb. 175). One undertaking cannot be given to discharge two attachments in different actions. (*Walton v. Daly*, 17 Hun, 601). Where there are two or more defendants, and an application is made, as prescribed in section six hundred and eighty-seven and section six hundred and eighty-eight, by one or more, but not by all of them, the undertaking must provide for the payment of any judgment, which may be recovered against any of the defendants in the action, unless the applicant makes proof, by affidavit, to the satisfaction of the court or judge, that the property, with respect to which the application is made, belongs to him separately; in which case, the undertaking must provide for the payment of any judgment, which may be recovered in the action against the applicant, either alone or jointly with any other defendant. (Co. Civ. Proc. § 689). An undertaking given as prescribed in section six hundred and eighty-eight and section six hundred and eighty-nine must be forthwith filed with the clerk. A copy thereof with a notice of the filing must be forthwith served upon the plaintiff's attorney; who may, within three days thereafter, give notice to the sheriff, that he excepts to the sufficiency of the sureties. Thereupon the sureties must justify, upon the like notice, and in like manner, as bail upon an arrest; or a new undertaking must be

given, with new sureties, who must justify in like manner. If the plaintiff does not except, as prescribed in this section, he is deemed to have waived all objection to the sureties. (Co. Civ. Proc. § 690). An undertaking given under these sections is void, if the attachment has been issued without jurisdiction. (*Coleman v. Bean*, 3 Keyes, 94). The sureties in the undertaking are bound by the recitals in it. (*Coleman v. Bean*, *supra*). They cannot deny the issue of the warrant, or that the grounds of attachment which are recited in the attachment, actually exist. (*Higgins v. Healy*, 47 Super. 207; *affd.* without op., 89 N. Y. 636). The sheriff is responsible for the sufficiency of the sureties; and he may retain possession of the property attached, and the proceeds thereof, until the objection to them is waived, as prescribed in section six hundred and ninety, or they, or the new sureties, justify. (Co. Civ. Proc. § 691). It is the duty of the sheriff to retain possession of the property until the sufficiency of the sureties has been waived, or until they have justified. This is a substantial right, of which the plaintiff cannot be deprived. And he does not waive it by a verbal consent to the entry of the usual order for the discharge of the attachment. (*Moses v. The Waterbury Button Co.*, 15 Abb. Pr. N. S. 205; 46 How. Pr. 528).

Subdivision 3.—DISCHARGE OF VESSELS UNDER THE ATTACHMENT.

Sections six hundred and eighty-seven to section six hundred and ninety-one, both inclusive, are applicable where a vessel, or a share, or interest therein, is attached. If it is necessary to enable the defendant to discharge the attachment, the court or judge may, by order, stay any proceedings specified in article second of title three, chapter seven, of the code of civil procedure, relating to the execution of the warrant of attachment pending the action, or extend the same to do any act specified in that article. (Co. Civ. Proc. § 692).

Subdivision 4.—APPLICATION BY PARTNERS TO DISCHARGE
ATTACHMENT.

If a warrant of attachment is levied upon the interest of one or more partners, in goods or chattels of a partnership, the other partners who are not defendants in the action, or any of them, may at any time before final judgment, apply to the judge who granted the warrant, or to the court, upon an affidavit showing the facts, for an order to discharge the attachment, as to that interest. (Co. Civ. Proc. § 693). Upon such an application, the applicant must give an undertaking, with at least two sufficient sureties, to the effect that they will pay to the sheriff, on demand, the amount of any judgment, which may be recovered against the partner who is defendant in the action; or which may be recovered against him, in any other action, wherein the other partners are not defendants, and wherein a warrant of attachment, or an execution, may come to the sheriff's hands, at any time before the warrant of attachment, which was so levied, is vacated or annulled; not exceeding a sum, specified in the undertaking, which must not be less than the value of the interest of the defendant, in the goods or chattels seized by virtue of the attachment, as fixed by the court or judge; if the value, in the opinion of the court or judge, is uncertain, the sum shall be such as the court or judge determines. (Co. Civ. Proc. § 694). For the purpose of fixing the sum, or determining the sufficiency of the sureties, the court or judge may receive affidavits or oral testimony, or may direct a reference. (Co. Civ. Proc. § 695). The court or judge to whom the application is made, may direct that the plaintiff shall have notice of the application for discharge of property under this subdivision, or of the hearing under an order of reference, made as prescribed in section six hundred and ninety-five; and if the applicant does not appear, where notice has been given, the application may be dismissed or denied. (Co. Civ. Proc. § 696).

ARTICLE V.

REGULATIONS WHERE THERE ARE TWO OR MORE WARRANTS
AGAINST THE SAME DEFENDANT.

SECTION.

1. Levy under a junior warrant.
2. Attachment of foreign vessel under junior warrant.
3. Rights of junior plaintiff as to actions.
4. Rights of third and other attaching creditors.

Sec. 1. Levy Under a Junior Warrant.

Where a domestic vessel, or a share or interest therein, has been attached, and afterwards released, as prescribed in title three of chapter seven of the code of civil procedure, or where the personal property of a partnership, of which the defendant was a member, has been attached, and the attachment afterwards discharged, upon the application of another partner, as prescribed in said title; another warrant against the same defendant, shall not be levied on the same property, by the sheriff of the same or of any other county, until after the first warrant has been vacated or annulled. But, except as thus prescribed, where a second warrant, against the same defendant, is delivered to the same sheriff, he must execute it by a levy upon property within his county, and he must thereupon take the same proceedings, as if the levy was made under the first warrant. (Co. Civ. Proc. § 698). Mr. Throop says in his notes to this section, that the exemption of a domestic vessel, and of partnership property from a second levy, rests upon the ground that the undertaking for their release, is for the benefit of all the attaching creditors; and the undertaking is required to be so framed that the new levy is unnecessary. (See Co. Civ. Proc. §§ 662, 694).

Where two or more warrants of attachment against the same defendant, are delivered to the sheriff of the same county, to be executed, their respective preferences, and the rules, where a levy, or a levy and sale, have been made under a junior warrant, are the same as where two or more executions, against the property

of the same defendant, are delivered to the sheriff of the same county, to be executed. (Co. Civ. Proc. § 697). In the case of two executions, that one has preference which is first delivered to the sheriff. (Co. Civ. Proc. § 1406; *Gillig v. Treadwell Co.*, 148 N. Y. 177).

Sec. 2. Attachment of Foreign Vessel Under Junior Warrant.

Where a foreign vessel, or a share or interest therein, has been attached and valued, as prescribed in article second of title three, chapter seven of the code of civil procedure, and the plaintiff, in the first warrant of attachment, fails to give an undertaking to prevent the release thereof, the court or judge may grant to the plaintiff in a second warrant, then in the sheriff's hands for execution, an extension, of not more than three days thereafter, within which to furnish an undertaking in all respects like the one to be furnished by the first plaintiff. And if he furnishes it, within that time, he has the same rights and privileges, and is subject to the same duties and liabilities, with respect to the vessel and its proceeds, and the subsequent proceedings relating thereto, as if his was the first warrant. (Co. Civ. Proc. § 701). If a foreign vessel, or a share or interest therein, has been attached, and afterwards released, by reason of the failure of the plaintiff in the first or the second warrant, to give an undertaking to prevent the release, it shall not be again attached, under warrant against the same defendant, which had been delivered to the sheriff of the same county, before the expiration of the time within which the undertaking should have been furnished. But it may again be attached, under a subsequent warrant against the same defendant; in which case, the plaintiff therein, and the plaintiff in each warrant subsequently delivered to the sheriff, have the same rights and privileges, and are subject to the same duties and liabilities, with respect to the vessel and its proceeds, and the subsequent proceedings relating thereto, as if the warrant, under which it was attached, was the first warrant. (Co. Civ. Proc. § 702).

Sec. 3. Rights of Junior Plaintiff as to Actions.

Where the plaintiff in a warrant of attachment has commenced an action, in the name of himself and the sheriff jointly, as prescribed in title three, chapter seven of the code of civil procedure, a plaintiff in a junior warrant may apply to the court or judge, to direct as to the conduct, discontinuance or settlement of the same, or to impose terms, conditions, and regulations as to the continuance thereof, in the interest of the applicant; and such order may be made thereupon as justice requires. If the first warrant is vacated, or the attachment thereunder is released or discharged, without affecting the cause of action prosecuted by the plaintiff therein and the sheriff jointly, the plaintiff in the warrant, next in order, may, upon his own application, be substituted as joint plaintiff with the sheriff, by an order, made as upon an application for leave to bring such an action. (Co. Civ. Proc. § 703). A plaintiff in a second warrant may apply to a court or judge, upon notice to the plaintiff in the first warrant, and to the sheriff, for leave to bring and maintain, in the name of himself and the sheriff jointly, any action, which might be brought in the name of the senior plaintiff and the sheriff. If it appears that the plaintiff in the first warrant neglects or refuses to be joined with the sheriff in such an action, or to comply with the terms, conditions and regulations imposed, either upon granting him an order for that purpose, or upon the hearing of an application as prescribed in this section, the court or judge may grant to the plaintiff in the second warrant, leave to bring and maintain such an action, in the name of himself and the sheriff jointly, with like effect, as if his was the first warrant. (Co. Civ. Proc. § 704).

Sec. 4. Rights of Third and Other Attaching Creditors.

Where there are more than two warrants of attachment against the same defendant, the plaintiffs in the third and each subsequent warrant, have, according to their respective priorities, the same rights and privileges, as against the plaintiffs in all senior warrants, which the plaintiff in the second warrant has, as against

the plaintiff in the first, and are subject to the same duties and liabilities; except that a second extension of the time, within which to furnish an undertaking to prevent the release of a foreign vessel, or a share or interest therein, shall not be granted. And the plaintiffs in two or more junior warrants of attachment, may by agreement among themselves, take jointly, and for their common benefit, any proceedings permitted by title three, of chapter seven of the code of civil procedure to be taken, by the plaintiff in a second or subsequent warrant of attachment; provided, that it does not interfere with the preferential or other rights of an intermediate plaintiff. (Co. Civ. Proc. § 705).

ARTICLE VI.

PROCEEDINGS AFTER JUDGMENT.

SECTION.

1. Execution.
2. Judgment, how enforced.

Sec. 1. Execution.

Where a levy, under a warrant of attachment in an action, has been made, an execution against property, upon a final judgment in favor of the plaintiff therein, recovered after the expiration of the term of office of the sheriff who made the levy, must nevertheless be directed to and executed by that sheriff, unless another person is designated by law to complete the unfinished business pertaining to his office; or in that case, to the person so designated. (Co. Civ. Proc. § 706). The execution should be special in form. If directed to a sheriff who is out of office, it should be directed to him as late sheriff. (*McKay v. Harrower*, 27 Barb. 463). The execution should recite the attachment and the proceedings under it, and should direct the sale of the property as provided in section thirteen hundred and seventy of the code of civil procedure, to which reference is made. The requirements of this section are peremptory, and an execution, not in accordance with its provisions, is void and ineffective to pass a good

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title to the property sold thereunder. (*Place v. Riley*, 98 N. Y. 1). Issuing a general execution, destroys the efficacy of a levy under attachment, as has been noted heretofore. (*Peetsch v. Sommers*, 31 App. Div. 255). If the defendant dies, after the allowance of the warrant, but before a judgment, the right to order an execution upon the judgment, is with the court in which the action is pending, and not with the surrogate. (*Thacher v. Bancroft*, 15 Abb. Pr. 243).

Sec. 2. Judgment, How Enforced.

Where an execution against property is issued upon a judgment for the plaintiff, in an action in which a warrant of attachment has been levied, the sheriff must satisfy it as follows:

1. He must pay over to the plaintiff all money attached by him, and all proceeds of all sales of perishable property, or of any vessel, or share, or interest therein, or animals, sold by him, or of any debts, or other things in action, collected or sold by him; or so much thereof as is necessary to satisfy the judgment.

2. If any balance remains due, he must sell under the execution, the other personal property attached, or so much thereof as is necessary; including rights or shares in the stock of an association or corporation, or a bond or other instrument for the payment of money, executed and issued with the interest coupons annexed, if any, by a government, state, county, public officer, or municipal or other corporation, which is in terms negotiable, or payable to the bearer or holder, the principal whereof is not then payable; but not including any other debt or thing in action. If the proceeds of that property are insufficient to satisfy the judgment, and the execution requires him to satisfy it out of any other personal property of the defendant, he must sell the personal property, upon which he has levied by virtue of the execution. If the proceeds of the personal property, applicable to the execution, are insufficient to satisfy the judgment, the sheriff must sell, under the execution, all the right, title, and interest, which the defendant had in the real property attached, at the time when the

notice was filed, or at any time afterwards, before resorting to any other real property.

3. If personal property attached belonging to the defendant, has passed out of the hands of the sheriff without having been sold or converted into money, and the attachment has not been discharged as to that property, he must, if practicable, regain possession thereof; and, for that purpose, he has all the authority which he had, to seize the same under the warrant. A person who wilfully conceals or withholds such property from him, is liable to double damages, at the suit of the party aggrieved.

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking; which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.

5. At any time after levying the attachment, the court upon the petition of the plaintiff, accompanied with an affidavit, specifying fully all the proceedings of the sheriff, since the levy under the warrant, the property attached, and the disposition thereof; and the affidavit of the sheriff, showing that he has used due diligence in endeavoring to collect the debts and other things in action attached, and that a portion thereof remains uncollected; may direct the sheriff to sell the remaining portion upon such terms, and in such manner, as it thinks proper. Notice of the application must be given to the defendant's attorney, if the defendant appeared in the action. If the summons was not personally served on the defendant, and he did not appear, the court may make such order, as to the service of notice, as it thinks proper; or may grant the application without notice. (Co. Civ. Proc. § 708). In an action against a foreign corporation which does not appear, but whose property has been attached, an order may be made requiring a person owing a debt to it, or having its property in his possession to pay it to the plaintiff on account of the judgment. (*Chandler v. City of Fond du Lac*, 56 How. Pr. 449). Where a defendant who has not appeared, is a non-resident of the state,

or a foreign corporation, and the summons was served without the state, or by publication, pursuant to an order obtained for that purpose, as prescribed in chapter five of the code of civil procedure, the judgment can be enforced only against the property which has been levied upon, by virtue of the warrant of attachment, at the time when the judgment is entered. But this section does not declare the effect of such a judgment, with respect to the application of any statute of limitation. (Co. Civ. Proc. § 707). This section incorporates into the statute, the same rule which has been established by the supreme court of the United States. (*Pennoyer v. Neff*, 95 U. S. 714).

ARTICLE VII.

PROCEEDINGS AFTER WARRANT HAS BEEN VACATED, OR ATTACHMENT DISCHARGED.

Where a warrant of attachment is vacated or annulled, or an attachment is discharged, upon the application of the defendant, the sheriff must, except in a case where it is otherwise specially prescribed by law, deliver over to the defendant, or to the person entitled thereto, upon reasonable demand, and upon payment of all costs, charges, and expenses, legally chargeable by the sheriff, all the attached personal property remaining in his hands, or that portion thereof, as to which the attachment is discharged or the proceeds thereof, if it has been sold by him. (Co. Civ. Proc. § 709). A warrant of attachment against property is said to be "annulled," when the action in which it was granted, abates or is discontinued; or a final judgment, rendered therein in favor of the plaintiff, is fully paid; or a final judgment is rendered therein in favor of the defendant. But, in the case last specified, a stay of proceedings suspends the effect of the annulment, and the reversal or vacating of the judgment revives the warrant. (Co. Civ. Proc. § 3343, subd. 12). Where judgment has been entered on a verdict directed for the defendant, and an appeal taken, and an undertaking given staying pro-

ceedings upon the judgment pending the appeal, the court is powerless, by virtue of the provisions of section 3343, subdivision 12 to vacate the attachment. (*Henry v. Salisbury*, 33 App. Div. 293). The discharge of an attachment by the giving of an undertaking does not invalidate the attachment at all; the attachment still lives, the undertaking being substituted for the levy, and the defendant must, therefore, pay the sheriff's fees in order to be entitled to a return of his property. (*Lawlor v. Magnolia Metal Co.*, 2 App. Div. 552; app. dismissed, 149 N. Y. 591). Of course, where the attachment is vacated the rule is otherwise and no sheriff's fees need be paid. (*Upton v. Elec. Cons. Co.*, 89 Hun, 502). Where the sheriff is required by title three of chapter seven of the code of civil procedure, to deliver attached property, or the proceeds thereof, to the defendant, he must also deliver to him, unless otherwise specially directed by the court or judge, all books of account, vouchers, evidences of debt, muniments of title or other papers, relating to the property, either real or personal, or to its proceeds; together with all undertakings relating thereto, which he has taken in the course of the proceedings, and which have not been fully satisfied; except an undertaking given by the defendant, upon the discharge of property. He must also deliver a written assignment duly acknowledged, of each undertaking so delivered, and of each other instrument, to which the defendant is thus entitled, an assignment of which is necessary to perfect or protect the defendant's title thereto. The defendant must also, upon his own application only, be substituted in place of the sheriff, or the sheriff and the plaintiff jointly, in an action brought as prescribed in title three of chapter seven aforesaid; but the court or judge may impose, as a condition of granting the order of substitution, such terms as justice requires, with respect to indemnity and payment of expenses. The defendant's rights with respect to property attached and not disposed of, and an undertaking, or other instrument to which he is thus entitled, are the same as those of the sheriff while the warrant was still in force, except where his rights are specially

defined or regulated by law. (Co. Civ. Proc. § 710). At any time after the warrant of attachment has been vacated or annulled, or the attachment has been discharged as to real property attached, the court may, in its discretion, upon the application of any person aggrieved, and upon such notice as it deems just, direct that any notice, filed for the purpose of attaching the property, be canceled of record by the clerk of the county where it is filed and recorded. The cancellation must be made by a note to that effect, on the margin of the record, referring to the order; and, unless the order is entered in the same clerk's office, a certified copy thereof must, at the same time be filed therein. (Co. Civ. Proc. § 711). Where a warrant of attachment has been vacated or annulled, the sheriff must forthwith file in the clerk's office, the warrant, with a return of his proceedings thereon. Upon the application of either party, and proof of the sheriff's neglect, the court may direct him so to do, forthwith, or within a specified time. (Co. Civ. Proc. § 712).

CHAPTER XVII.

RECEIVERS AND OTHER PROVISIONAL REMEDIES.

ARTICLE I....Receiver.

ARTICLE II...When and in what cases appointed.

ARTICLE III...Rights and liabilities of receiver.

ARTICLE IV...Receivers of corporations.

ARTICLE V...Deposit, delivery or conveyance.

ARTICLE VI...General provisions.

ARTICLE I.

RECEIVER.

SECTION.

1. Who may be receiver.
2. Double receiver.
3. Appointment.

Sec. 1. Who may be Receiver.

The preservation of the fund is the main, if not the sole object of the receivership. The court itself has the care of the property in dispute. The receiver is the officer of the court. It is his duty to act in all things with a view to the equitable rights of all parties interested, and to dispose of the property under the orders of the court only. And so far from its being his duty to act upon the advice of the particular parties who procured his appointment, or of their counsel, he is bound in all cases of doubt, and especially of conflict of interest of claim, to take the direction of the court; and he will be allowed to obtain counsel for himself. (*Lottimer v. Lord*, 4 E. D. Smith, 183). When a receiver is appointed in a suit, he is appointed for the benefit of such of the parties as it shall afterwards appear were entitled to the funds in controversy; but not for the benefit of strangers to the suit. (*Howell v.*

Ripley, 10 Paige 43). It may be stated as a general rule that any person of full age who possesses the requisite ability, and can give the necessary security, may be appointed a receiver, unless he is in some way specially disqualified from acting in such capacity. By statute, trust companies may be appointed receivers by a court having jurisdiction, and they need not give security, unless specially required to by the court. (The Banking Law §§ 156, subd. 6, 158). Where a general agent was specified in an agreement as the party to close up the business, unless objected to by both parties; he was held to be a proper receiver, as against the objections of one of the parties. (*Hanover F. Ins. Co. v. Germania F. Ins. Co.*, 33 Hun, 539). On a voluntary dissolution, a stockholder may be appointed receiver (*In Re Eagle Iron Works*, 8 Paige, 385); and in a voluntary assignment of a bank, one of the officers of the bank was held not to be unlawfully appointed receiver; although there should be special reasons shown to warrant such an appointment. (*In re Bowery Bank*, 16 How. Pr. 56). A creditor may be appointed a receiver of his debtor's property. (*Chamberlain v. Greenleaf*, 4 Abb. N. C. 92).

No person holding the office of clerk, deputy clerk, special deputy clerk, or assistant in the clerk's office, of a court of record, or of the surrogate's court within the county of New York, shall hereafter be appointed by any court or judge, a receiver, except by the written consent of all the parties to the action or special proceeding, other than parties in default for failure to appear or to plead. (Co. Civ. Proc. § 90). But where a clerk of the court, in which a proceeding was pending, was appointed receiver in supplementary proceedings, in violation of this section, it was held to be a mere irregularity, which could not be set up by third persons, or in a collateral proceeding. (*Moore v. Taylor*, 40 Hun, 56). A non-resident, or a temporary resident is not a competent person to be appointed receiver. (*Chamberlain v. Greenleaf*, 4 Abb. N. C. 92). An officer of an insolvent bank is not to be appointed its receiver. (*Atty. Gen. v. Bank of Columbia*, 1 Paige, 511;

affd. 3 Wend. 588). The court will not appoint a party to the action as a receiver, except under special circumstances (*Fenn v. Bolles*, 7 Abb. Pr. 202); nor will one be appointed, who on account of his position, stands in an improper relation to the cause, as a party to an assignment which was impeached for fraud. (*Smith v. N. Y. Con. Stage Co.*, 28 How. Pr. 208). Where a stranger procures himself to be appointed a receiver, and obtains control of the fund in controversy, without the consent, and contrary to the wishes of the parties, he is an intruder and a trespasser, and will be held to strict responsibility. (*O'Mahoney v. Belmont*, 62 N. Y. 133). Any person having an interest, and feeling that he would be injured, or his interest endangered by the appointment of an improper person, may immediately apply for a change of receiver, and an injunction on his acts. (*Matter of Bowery Bank*, 16 How. Pr. 56).

Sec. 3. Double Receivers.

In view of the fact, that the appointment of a receiver has for its main, if not its sole object, the preservation of the fund, the question whether he shall be appointed upon the motion of one plaintiff or another, (each seeking to accomplish the same result, the preservation of the fund and its ultimate distribution among the creditors) ceases to be of any importance. (*Lottimer v. Lord*, 4 E. D. Smith, 183). It was said in an early chancery case that it was not the proper practice to appoint separate receivers of the same property, in different suits, but that the receivership in the first suit should be extended to the second. (*Howell v. Ripley*, 10 Paige, 43). Where a junior mortgagee obtains the appointment of a receiver of the rents, and profits in a suit instituted by him to foreclose his mortgage, no other receivership having been asked for, there is no doubt that he secures the right to such rents and profits as against even a prior mortgagee, (*Ranney v. Peyser*, 83 N. Y. 1), but when the latter begins foreclosure proceedings on his mortgage and asks for the benefit of a receivership, such rents and profits enure to his advantage from the time his request is granted by the

court. (*Howell v. Ripley, supra*). It is rather immaterial whether the court adopts the machinery of extending one receivership or that of superseding the former receiver by the appointment of another, to accomplish this division, but in many instances of later date than *Howell v. Ripley*, a separate receiver has superseded the one appointed on the petition of the junior mortgagee. (*Holland Trust Co. v. Cons. Gas etc. Co.*, 85 Hun, 454; *Putnam v. Henderson, Hull & Co.*, 49 App. Div. 361). In the case last cited the court in its opinion speaks of an extension of the receivership, but the record shows the appointment of a separate receiver. In cases of this sort a separate receiver may well be appointed, for the practical effect of granting a receivership in the second action is to supersede the receivership already existing. But where the receivership in the second action does not have that effect, it is plainly the correct practice to extend the existing receivership; so where a receiver of a corporation had been appointed in voluntary dissolution proceedings, it was held error to appoint a separate receiver in a suit to foreclose a chattel mortgage, the proper practice being to extend the receivership already existing (*Farmers' Loan & Trust Co. v. Hotel Brunswick Co.*, 12 App. Div. 626). Upon such an extension of a receivership the proper practice is to direct the receiver to hold the funds subject to the further order of the court—not to determine the rights of the respective claimants. (*Putnam v. Henderson, Hull & Co., supra*; *Matter of Busch Brewing Co.*, 41 App. Div. 204). A receiver of the rents and profits of mortgaged premises, appointed upon petition of the mortgagee in a foreclosure suit, is entitled to receive such unpaid rents as against a receiver of the mortgagor, appointed in supplementary proceedings, even though the rents became due prior to the appointment of the former and after that of the latter. (*Donzon & Miller Mfg. Co. v. Canella*, 89 Hun, 21). The fact that a receiver of the judgment debtor's property has already been appointed in proceedings supplementary to execution, does not bar an application for a receiver in a judgment creditor's

action; and does not make it necessary that the same receiver should be appointed, in granting it. (*State Bank v. Gill*, 23 Hun, 410). The plaintiff may have a receiver appointed before trial, even when other receivers of the same property have been previously appointed by other courts in separate actions; but the latter appointment must be subject to the exercise of the powers of the previously appointed receiver, or any other prior judicial authority under which the funds in controversy are held. And when the prior receiverships have become *functus officio*, such subsequent receiver takes the fund or any remaining portion of it, or so much of it as is undisposed of by the court. (*Bailey v. Belmont*, 10 Abb. Pr. N. S. 270; *O'Mahoney v. Belmont*, 62 N. Y. 133). A permanent receiver appointed by final judgment supersedes a temporary receiver appointed in another suit to preserve the property until final judgment. (*Glines v. Binghamton Trust Co.*, 68 Hun, 511). Where there is a controversy among creditors regarding the assets, and a receiver has been appointed in a suit brought by part of the creditors, and other creditors bring a suit, seeking to apply the assets to the exclusion of the rights claimed by the former, a second receiver will not be appointed, unless the first receiver, or the creditors he represents are made parties, and have an opportunity to be heard. (*Bank of Mut. Redemp. v. Sturgis*, 9 Bosw. 608). Where two receivers were appointed on the same day, and it became a question of legal priority, which the court was bound to settle, it was held that the court would inquire into the fractions of a day on which the two receivers were appointed, to determine that question. (*People v. Central City Bank*, 53 Barb. 412).

Sec. 3. Appointment.

The receiver is appointed by the court. (Co. Civ. Proc. § 713). A receiver of rents and profits must be appointed by the court, and not by a judge at chambers. (*Ireland v. Nichols*, 7 Robt. 476). The appointment of a receiver, like other provisional remedies, is discretionary with the court, and should be governed by the cir-

cumstances of each case. (*Fellows v. Heermans*, 13 Abb. Pr. N. S. 1). An order appointing a receiver is not appealable to the court of appeals, if there was power in the court below to make the appointment. (*Id.*; *Denike v. N. Y. & R. Line etc. Co.*, 80 N. Y. 599). But an appeal may always be taken to the appellate division. (Co. Civ. Proc. § 1347). Where the code of civil procedure authorizes the court to appoint a receiver etc., it may direct a reference to one or more persons, designated in the order, either to make the appointment, to report the facts to the court, for its action thereupon. And where according to the practice of the court of chancery, on the thirty-first day of December, eighteen hundred and forty-six, a matter was referable to the clerk, or to a master in chancery, a court having authority to act thereupon, may direct a reference to one or more persons designated in the order, with the powers which were possessed by the clerk, or the master in chancery, except where it is otherwise specially prescribed by law. (Co. Civ. Proc. § 827). The selection and appointment of a receiver and taking security from him, is a proper matter for a reference. (*Wetter v. Schlieper*, 7 Abb. Pr. 92). Where the reference is to report a proper person to be appointed, an appointment by the court is necessary; but where the reference is to appoint a receiver and take security, the appointment by the referee needs no confirmation. (*In re Eagle Iron Works*, 8 Paige, 385). A receiver is not usually appointed until after the service of the summons (*McCarthy v. Peake*, 9 Abb. Pr. 164); and not while the summons is publishing, except under special circumstances (*Sandford v. Sinclair*, 3 Edw. 393; *affd.* 8 Paige, 373); and an order to show cause why a receiver should not be appointed, served before the action is commenced, is held to be irregular. (*Kattenstroth v. Astor Bank*, 2 Duer, 632). Where the appointment of a receiver has been denied, leave to renew the application will be granted upon new evidence in support of the application. (*Devlin v. Hope*, 16 Abb. Pr. 314). Consent to the appointment of a receiver is a waiver of all irregularities in such appointment. (*Powell v.*

Waldron, 89 N. Y. 328). The court may, at any time before the appointment of a receiver, which has been directed, is consummated, revoke such appointment, and appoint another. (*Siney v. N. Y. Con. Stage Co.*, 18 Abb. Pr. 435).

ARTICLE II.

WHEN AND IN WHAT CASES APPOINTED.

SECTION.

1. Before final judgment.
2. By or after final judgment.

Sec. 1. Before Final Judgment.

Subdivision 1.—IN WHAT CASES.

In addition to the cases, where the appointment of a receiver is specially provided for by law, a receiver of property, which is the subject of an action, in the supreme court or a county court, may be appointed by the court, before final judgment, on the application of a party, who establishes an apparent right to, or interest in, the property, where it is in the possession of an adverse party, and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured, or destroyed. (Co. Civ. Proc. § 713, subd. 1). The language of this section is not prohibitory nor exclusive, but it is permissive and declaratory; and the courts still retain the general power of appointing receivers as at common law, by virtue of section four of the code of civil procedure, which provides that each of the courts therein mentioned "shall continue to exercise the jurisdiction and powers now vested in it by law, according to the course and practice of the court, except as otherwise prescribed in this act." This provision of the code continues to the supreme court the same powers to appoint receivers, as was inherent in the court of chancery before 1848; and, following that construction, it was held that the court has still the power to appoint a receiver of the rents and profits of mortgaged prop-

erty, although such receiver was not provided for in the mortgage (*Hollenbeck v. Donnell*, 94 N. Y. 342), and regardless of the character of the parties before it, whether individual or corporate. (*Decker v. Gardner*, 124 N. Y. 334). The word "property" as used in the section above quoted, includes the rents, profits, or other income, and the increase of real, or personal property. (Co. Civ. Proc. § 713). The court will not interfere by the exercise of the extraordinary power, where the party has a full and adequate remedy at law. It is a high power; and it is never exercised, if any other safe and expedient remedy can be used (*Nat'l Union Bk. v. Riger*, 38 App. Div. 123); and never where irreparable injustice might follow. The exercise of the power, therefore, must always depend upon the sound discretion of the court in each particular case. There is no case in which the court appoints a receiver merely because it can do no harm. (*Corey v. Long*, 43 How. Pr. 492). The person seeking the relief, must show that he has at least a probable, or an apparent interest in the property, and that there is danger of his interest in the property being lost or impaired. (*Goodyear v. Betts*, 7 How. Pr. 187). Where a defendant has absconded to prevent service of summons, or has left the state, and is not expected to return for several months, and has no place of business, or residence where service can be made on him, a receiver may be appointed, under this section. (*People v. Norton*, 1 Paige, 17). To authorize the appointment of a receiver, it must appear that the plaintiff has a cause of action, and that recovery is probable, and that the benefit of such recovery will be either wholly lost, or substantially impaired, by reason of the defendant's insolvency, if the receiver is not appointed. (*Gregory v. Gregory*, 33 Super. 1; *Waeber v. Rosenstein*, 6 App. Div. 447). A plaintiff cannot claim a receiver of property in which he has no interest (*Smith v. Wells*, 20 How. Pr. 158); nor of property abroad, belonging to persons not within the jurisdiction of the courts of this state (*Field v. Ripley*, 20 How. Pr. 26); nor in actions to recover real property, unless equitable grounds appear, entitling plaintiff to rents and profits as such, or

unless sequestration is necessary to his protection (*People v. Mayor, etc.*, 10 Abb. Pr. 111; *Mitchell v. Barnes*, 22 Hun, 194); nor in an action to recover the possession of real estate, from one in possession under a contract of sale (*Gurnsey v. Powers*, 9 Hun, 78); nor in an action to stay waste (*Robinson v. Preswick*, 3 Edw. 246), nor in an action, under section 2653a, of the code of civil procedure, to determine the validity of a will. (*Johnson v. Cochrane*, 91 Hun, 163). It was held in *Webb v. Van Zandt* (16 Abb. Pr. 314, note), that in an action to foreclose a mechanic's lien, a receiver of the rents and profits might be appointed *pendente lite*; but in the case of *Meyer v. Seebald* (11 Abb. Pr. N. S. 326, note), such appointment was held to be improper; while in the still later case of *Gallagher v. Karns* (27 Hun, 375; S. C., 15 Wk. Dig. 217), decided in the general term, it was held that under chapter four hundred and forty, laws of 1880, such an appointment is proper, and a receiver *pendente lite* may be appointed in such an action. The lien law (laws 1897, chapter 418), and chapter 419, of the laws of 1897, repealed all of the provisions of chapter 440, of the laws of 1880. But, inasmuch as the last mentioned statute added provisions to the code of civil procedure (§§ 3399, 3400) for an action to foreclose the lien, much of the court's reasoning in *Gallagher v. Karns* (*supra*), based upon a similar provision of the act of 1880, seems applicable. Before the appointment of a receiver, there should appear some real necessity for it; and it is not sufficient, in the application for a receiver of the property of a partnership, to simply show that the partners quarreled between themselves. (*McElroy v. Lewis*, 76 N. Y. 373). Nor can one partner as plaintiff, have a receiver of the partnership property appointed, where his right does not clearly appear, and where the fund is not shown to be in danger (*Goulding v. Bain*, 4 Sand. 716); and the rule is the same, of course, as to the personal representatives of a deceased partner. (*Booth v. Smith*, 79 Hun, 384). The court may, by an order, or by the interlocutory or final judgment in a judgment creditor's action, appoint a receiver of any or all of the property of the

judgment debtor; and may direct the judgment debtor, or any other defendant in the action, to convey or deliver to the receiver, as justice requires, any property, real or personal, book, voucher, or other paper, or to execute any instrument, which it deems necessary, for perfecting or assuring the receiver's title or possession. (Co. Civ. Proc. § 1877). A receiver can be appointed in a creditor's suit after the defendant's death where the action was begun before defendant's death (*Brown v. Nichols*, 9 Abb. Pr. N. S. 1; 42 N. Y. 26); but it is held that in a creditor's action, a receiver should not be appointed until the remedy at law has been exhausted (*Starr v. Rathbone*, 1 Barb. 70); and should be appointed only for the specific property sought to be reached in the action. (*Natl. Union Bk. v. Riger*, 38 App. Div. 123). When a receiver has been appointed in such an action, the assignment to him becomes void, as soon as the object of the suit is accomplished; and the property reverts to the grantor without a re-assignment. (*Anderson v. Treadwell*, 1 Edm. 201). The appointment of a receiver has been held proper in the following cases: of an estate, assigned for the benefit of creditors, pending a proceeding to remove the assignee (*Manning v. Stern*, 1 Abb. N. C. 409); of the property in the hands of a trustee, where he is charged with violating his trust (*Boyd v. Murray*, 3 Johns. Ch. 48), or in the hands of one sought, by the action, to be held as a constructive trustee on account of fraud (*Bird v. Lanphear*, 92 Hun, 567); of the property of a limited partnership, which has become insolvent, and which neglects to place its assets in the hands of a proper person, to distribute ratably among the creditors; in which case any creditor is entitled to have a receiver appointed (*Whitewright v. Stimpson*, 2 Barb. 379); in an action to have dower set off (*Egan v. Walsh*, 43 Super. 402); upon the closing up of a partnership, where there is a right to dissolve, in which case it is a matter of course to appoint a receiver upon the application of either partner (*Marten v. Van Schaick*, 4 Paige, 479); and in such action to dissolve a partnership, the appointment of a receiver is proper, unless special circumstances are shown to

the contrary. (*Llorens v. Costa*, 5 Wk. Dig. 484). A receiver will not be appointed of a subsisting partnership, unless it is evident that a dissolution will be decreed. (*Garretson v. Weaver*, 3 Edw. 385). Where fraud is shown, and the fund is in danger, a receiver will be appointed. (*Boyd v. Murray*, 3 Johns. Ch. 48). In all cases of fraudulent trusts, the appointment will be made on the application of a judgment creditor. (*Chautauqua Co. Bank v. White*, 6 N. Y. 236). A remainder man has such an interest in the property as will entitle him to have a receiver appointed, where the life tenant fails to appropriate the rents to keep down the taxes. (*King v. King*, 41 Super. 516). In order to preserve the property from serious loss, the court will appoint a receiver during the pendency of the action for a partition (*Pignolet v. Bushe*, 28 How. Pr. 9); especially where it appears that such appointment entered into the expectation and agreement of the parties, prior to the commencement of the action (*Bowers v. Durant*, 2 N. Y. St. Rep. 127); but in any case it must be shown that such a step is necessary for the protection of the party asking for the relief. (*Bathmann v. Bathmann*, 79 Hun, 477). Receivers in mortgage cases are allowed with great caution; only where the security is actually inadequate, or where the rents are pledged for the debt (*Shotwell v. Smith*, 3 Edw. 588); and it must clearly appear that the premises are an inadequate security for the debt, and that the mortgagor or other person personally liable is insolvent (*Burlingame v. Parce*, 12 Hun, 144; *Ross v. Vernam*, 6 App. Div. 246); it must also appear that the debt is due, unless the rents and profits are specifically pledged. (*Bank of Ogdensburgh v. Arnold*, 5 Paige, 38). While a clause in the mortgage stipulating for the appointment of a receiver of the rents and profits of the mortgaged premises, is entitled to consideration and weight upon an application for such a receivership (*Fletcher v. Krupp*, 35 App. Div. 586), courts of equity will not enforce such provisions in a mortgage where it would be inequitable or unconscionable to do so. (*Degener v. Stiles*, 6 N. Y. Supp. 474). So, where the whole

amount of the mortgage debt is not due, but a portion thereof is due, and the property is so circumstanced that a parcel of sufficient value to satisfy the amount due can be separately sold, the receivership should be extended to such parcel only. (*Hollenbeck v. Donnell*, 94 N. Y. 342). A mortgagee has no claim as such to the receipts of the rents and profits of the mortgaged property; but in a proper case he may have a receiver of the rents etc., appointed, who will be entitled to collect and apply them in reduction of the mortgage debt; and in such a case, the receiver may be authorized to collect such rents as have theretofore accrued, but have not yet come to the hands of the owner of the equity of redemption; but not such as have been already collected and are in the possession of such owner. (*Wyckoff v. Scofield*, 98 N. Y. 475). The appointment of a receiver in mortgage cases is entirely discretionary with the court; and it is not obliged to exercise its power to compel the owner to pay the rents and profits to the receiver. (*Rider v. Bagley*, 84 N. Y. 461). In case of a mortgage on chattels, which chattels are held by the mortgagee, a receiver on the application of the mortgagor will only be appointed where there is a pressing necessity for it, as where the mortgagee is irresponsible, or is committing waste. (*Patten v. Access. Trans. Co.*, 4 Abb. Pr. 235). And if the mortgagee establishes in such case that there is a balance due him, the receiver will not be appointed. (*Quinn v. Brittain*, 3 Edw. 314). In an action for the foreclosure of a contract for the sale of land, brought against the original purchaser and his grantee of a portion of the premises, who has made improvements thereon, a receiver is properly appointed upon proof that the whole premises are rapidly depreciating in value, and are inadequate as security for the amount remaining due on the contract of sale, and that the original purchaser is insolvent. (*Smith v. Kelley*, 31 Hun, 387). In an action for money had and received, a receiver should not be appointed. (*O'Mahoney v. Belmont*, 62 N. Y. 133). Where a partner as plaintiff prays for a dissolution of the firm, the taking of an account, the appoint-

ment of a receiver, and that the defendants pay to him a sum specified, if anything is found due to him; his remedy is by application to the court for the appointment of a receiver, and a sale of the partnership effects. (*Kapp v. Barthan*, 1 E. D. Smith, 622). Where the estate of a decedent has been brought under the jurisdiction of the supreme court, by an action for partition or distribution, or for the construction or establishment of a will, the court may, upon the death of the sole surviving executor, appoint a receiver of the estate, pending the action, upon such terms and conditions, and upon such notice to the parties interested, as the court directs. (Co. Civ. Proc. § 1869).

In cases of trust, where the fund is in danger, a receiver may be demanded as a matter of right (*Jenkins v. Jenkins*, 1 Paige, 243); as in the case of the fraud, misconduct or negligence of an executor, administrator or trustee (*Id.*; *Middleton v. Dodswell*, 13 Ves. 266), or of his insolvency; unless it clearly appears to have been the intention of a testator to intrust his estate to an insolvent executor (*Langley v. Hawk*, 5 Madd. 46), as in such a case it is for the testator and not the court to say who shall manage his estate. So it has been held that the courts will not interfere with executors upon slight grounds; but in the case of an administrator, who is a creation of the court, even slight grounds of apprehended danger will be ground for the court's selecting a more suitable person to have charge of the fund. (*Middleton v. Dodswell*, 13 Ves. 266). Where the property of infants, lunatics, or other persons wholly, or partially incompetent to manage their affairs, is in danger, the courts are always solicitous in guarding such property, and if an action is brought in behalf of, or against such a party, and the fund in controversy is in danger, a receiver will be appointed; and in the case of an infant, the receiver will not be discharged until the infant, after coming of age, has had a fair opportunity of examining his accounts. (*Matter of Van Horne*, 7 Paige, 46). In proceedings for the appointment of a committee of a lunatic, a receiver may be

appointed, until the question of lunacy is determined. (*Matter of Heli*, 3 Atk. 634).

Subdivision 2.—APPLICATION AND NOTICE.

Upon application to the court for the appointment of a receiver, the party must establish an apparent right to, or interest in the property, and that there is danger that such right or interest will be lost or impaired, unless a receiver is appointed. (Co. Civ. Proc. § 713). He may establish these facts in any of the usual ways of presenting facts to the court, by a petition asking for such appointment and reciting the necessary facts, or by the pleadings, or by affidavits; it must appear that he has a cause of action, and that recovery is probable, and that the benefit of such recovery will be lost or impaired, unless a receiver is appointed. (*Gregory v. Gregory*, 33 Super. 1). A receiver will not be appointed, unless facts are shown entitling plaintiff to a receiver, even though his pleading contain in its demand for relief, a request for such an appointment. (*Dusenbury v. Dusenbury*, 2 McC. Civ. Proc. Rep. 91). The facts are what give the court the right to appoint, and these must be stated in the moving papers, and if the defendant's answer contains allegations which show that plaintiff is not entitled to recover in his action, which facts are not denied by the plaintiff, the court will refuse to appoint a receiver. The application for a receivership differs from that for some of the provisional remedies, in that there is not so strict a requirement concerning positive statements in the affidavits or petition upon which the relief is asked; statements upon information and belief, therefore, made in a verified complaint upon an application for the appointment of a receiver, when not met or denied either by answer or affidavits fully establish the facts alleged. (*Holland Trust Co. v. Cons. Gas etc. Co.*, 85 Hun, 454). The practice on such motions is stated in a former chapter on Motions and Orders.

Notice of an application for the appointment of a receiver, in an action before judgment therein, must be

given to the adverse party, unless he has failed to appear in the action, and the time limited for his appearance has expired. But where an order for the publication of the summons has been made, the court may, in its discretion, appoint a temporary receiver, to receive and preserve the property, without notice, or upon a notice given by publication, or otherwise, as it thinks proper (Co. Civ. Proc. § 714). Where an advertisement for defendant's appearance is running, a receiver should not be appointed except under special circumstances (*Sandford v. Sinclair*, 3 Edw. 393; *affd.* 8 Paige, 373); a provision in a mortgage for the appointment of a receiver of the rents and profits seems to have been deemed such "special circumstances." (*Fletcher v. Krupp*, 35 App. Div. 586; *Citizens Bk. v. Wilder*, 11 App. Div. 63). By the section above quoted, it is necessary to give notice of the application in every case, except the one specified in the section; hence the decisions in a number of cases before the code, that a receiver might under certain circumstances be appointed *ex parte*, are no longer useful as authority; excepting that it has been held that in an action to dissolve a partnership, a receiver of the firm may be appointed upon the application of all the resident partners without notice to a non-resident partner. (*Alford v. Berkele*, 29 Hun, 633). In an application to dissolve an express company, where the plaintiff moved on *ex parte* affidavits for a receiver to take charge of the business and affairs of the company for the time being; it was held that the motion could not be granted, unless by the affidavits it appeared beyond the possibility of doubt, that in the final decision of the cause, the relief prayed for in the complaint must be granted. (*Waterbury v. Merch. Un. Ex. Co.*, 50 Barb. 157).

Sec. 2. By or After Final Judgment.

In addition to the cases, where the appointment of a receiver is specially provided for by law, a receiver of property, which is the subject of an action in the supreme court or a county court, may be appointed by the court, by or after the final judgment, to carry the judgment into effect, or to dispose of the property,

according to its directions; or after final judgment, to preserve the property during the pendency of an appeal. The word property includes the rents, profits or other income, and the increase, of real or personal property. (Co. Civ. Proc. § 713, subds. 2, 3). This section does not refer to a receiver in supplementary proceedings; that subject will be treated in connection with those proceedings, in another volume. Where a judgment or an order in a divorce or separation suit requires a husband to provide for the children of the marriage or the wife, and he fails to make any payment directed by such a judgment or order, or to give security for the various payments if ordered to do so, or to pay any sum directed to be paid by him as a counsel fee to enable his wife to carry on or defend the action, the court may cause his personal property, and the rents and profits of his real property to be sequestered, and may appoint a receiver thereof. (Co. Civ. Proc. § 1772). A receiver may be appointed pending an appeal from a judgment, on appellant's motion, although the property remains in his possession at the time of the application, but which by the judgment appealed from was awarded to the respondent. (*Fellows v. Heermans*, 13 Abb. Pr. N. S. 1). A receiver must always be asked for by a creditor after judgment, where he has obtained an injunction against the debtor, to protect his property, and effectuate his lien. (*Lent v. McQueen*, 15 How. Pr. 313; *Webb v. Overmann*, 6 Abb. Pr. 92). Where judgment has been rendered in an action of ejectment, which adjudges a party entitled to rents and profits, there is no legal objection to the appointment of a receiver in an action for such rents and profits. (*Sheridan v. Jackson*, 5 Wk. Dig. 443). But pending the action of ejectment, the court will not appoint a receiver of the rents and profits (*Thompson v. Sherrard*, 35 Barb. 593); except where such appointment is necessary to protect the property, or its rents and profits, *pendente lite* (*People ex rel v. Mayor etc.*, 10 Abb. Pr. 111); such receiver cannot usually be appointed until after judgment. (*Burdell v. Burdell*, 54 How. Pr. 91).

ARTICLE III.

RIGHTS AND LIABILITIES OF RECEIVERS.

SECTION.

1. Security.
2. What passes to receiver.
3. Powers of receiver.
4. How controlled.
5. Liabilities.
6. Compensation.
7. How removed or discharged.

Sec. 1. Security.

A receiver appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond to the people, with at least two sufficient sureties, in a penalty fixed by the court, judge, or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver; and the execution of any such bond by any fidelity or surety company authorized by the laws of this state to transact business shall be equivalent to the execution of said bond by two sureties. And the court, or, where the order was made out of court, the judge making the order, by or pursuant to which the receiver was appointed, or his successor in office, may at any time, remove the receiver or direct him to give a new bond, with new sureties, with the like conditions. But the foregoing provisions of this section do not apply to a case where special provision is made by law, for the security to be given by a receiver, or for increasing the same, or for removing a receiver. A receiver who, having executed and filed a bond as provided for in this section, before presenting his accounts as receiver, must give notice to the surety or sureties on his official bond, of his intention to present his accounts, not less than eight days before the day set for the hearing on said accounting. The same notice must be given to such surety or sureties where the accounting is ordered on the petition of a person or persons other than the receiver, and in no case shall

the receiver's accounts be passed, settled, or allowed, unless the said notice provided for in this section shall have first been given to the surety or sureties on the official bond of such receiver. (Co. Civ. Proc. § 715). The security required from receivers of corporations will be treated in article IV of this chapter, *infra*. Where a receiver is appointed upon the death of the sole surviving executor, he need give only such security, if any, as to the court seems proper. (Co. Civ. Proc. § 1869). Where a trust company has been appointed receiver, it need not give security, unless specially directed by the court. (The Banking Law, 156, subd. 6, 158). The surety of a receiver is liable on his bond, if the receiver fails to pay over money which he is ordered to pay, though the receiver has been theretofore removed. (*Thompson v. McGregor*, 45 Super. 197; reversed on another point, 81 N. Y. 592). The sureties cannot be held, however, until an accounting has been had; they are properly chargeable for no greater amount than their principal is liable to pay, so it must be determined on such accounting how much is actually due from the principal. (*French v. Dauchy*, 134 N. Y. 543). Where one of the sureties of the receiver became insolvent, but it appeared that the property in the receiver's hands was small, and that the remaining surety was responsible, a motion to compel new sureties was denied; and it was held, on appeal, to be a proper exercise of discretion. (*Haulenbeck v. Heacock*, 47 Super. 533). Where an order, entered by stipulation, required only one surety instead of two as required by section seven hundred and fifteen, such order is not void; but the court may amend it so as to require two sureties to be given. (*Holmes v. McDowell*, 15 Hun, 585; *affd.* 76 N. Y. 596).

Sec. 2. What Passes to Receiver.

A receiver, appointed pursuant to an order or a judgment, in an action in the supreme court, or a county court, or in a special proceeding for the voluntary dissolution of a corporation, may take and hold real property upon such trusts, and for such purposes as the

court directs, subject to the direction of the court, from time to time, respecting the disposition thereof. (Co. Civ. Proc. § 716). Where a receiver has been appointed on the death of a sole surviving executor, he becomes the successor in interest of the said executor, for the purpose of carrying into effect the judgment or orders of the court, in relation to the estate. (Co. Civ. Proc. § 1869). Where an order for the appointment of a receiver is followed by consummation, by giving the necessary security, the estate of the judgment debtor vests in the receiver, as of the date of the order (*Wilson v. Allen*, 6 Barb. 542; *Matter of Christian Jensen Co.*, 128 N. Y. 550); the receiver's title, relating back, as it does to the date of the order, defeats any levy or attachment made between the date of the order and the giving of the security (*Steele v. Sturges*, 5 Abb. Pr. 442; *Matter of Schuyler's Steam Tow Boat Co.*, 136 N. Y. 169; reversed on another point, 154 U. S. 256); but this fiction of relation will not be used to work injustice, so where a creditor had been prevented by a frivolous demurrer from securing his judgment until after the appointment of the receiver, but an execution had been levied before the filing of his bond, the receiver was declared to hold the property subject to the lien of the judgment. (*Matter of Lewis & Fowler Mfg. Co.*, 89 Hun, 208). Where an order was made for a receiver, and it was referred to a referee to appoint a suitable person, which order was appealed from, and a stay of proceedings obtained, and meanwhile the defendants brought a suit against the same corporation, and had another receiver appointed; and the order in the first action was subsequently affirmed, and the receiver thereunder was appointed; the court held that the latter appointment dated back to the time of the granting of the order of reference, and gave the receiver so appointed a right to possession of the assets to the exclusion of the other. (*Deming v. N. Y. Marble Co.*, 12 Abb. Pr. 66). This rule is not extended to cases where the reference is merely to select a suitable person to be appointed by the court, upon the report of the referee; the title of the receiver in such case does not relate back to the

order of reference, but only to the actual appointment by the court. (*Lottimer v. Lord*, 4 E. D. Smith. 183). The ordinary chancery receiver, i. e., a receiver *pendente lite*, acquires no title, but only the right of possession as the officer of the court; the title remains in those in whom it was vested when the appointment was made. (*Kecney v. Home Ins. Co.*, 71 N. Y. 396; *Decker v. Gardner*, 124 N. Y. 334). The order appointing a receiver *pendente lite*, in a partnership case, effects no change in the title to the property, unless the directions of the order regarding the transfer and delivery to the receiver are complied with, and the property is actually made over to such receiver. (*Fincke v. Funke*, 25 Hun, 616). The appointment of a receiver is consummated by his giving the security required by law or by the court, and the personal estate and equitable interests of the party of whom he is permanent receiver vest in him, without any assignment, as of the date and by virtue of the order of his appointment (*Porter v. Williams*, 9 N. Y. 142); but, unless he becomes the successor in interest of a deceased executor (Co. Civ. Proc. § 1869), or is specially directed by the court to take and hold real estate (Co. Civ. Proc. § 716), the title to real estate only vests in a receiver by virtue of a conveyance to him by the debtor, which, however, the court has power to compel; and such title is subject to the liens existing at the time of such conveyance, of all parties, excepting those who are parties to the action. (*Chautauqua Co. Bank v. Risley*, 19 N. Y. 369). A receiver of personal estate and of rents and profits, appointed in an action by a married woman for divorce in pursuance of the provisions of section 1772 of the code of civil procedure (formerly 2 R. S. 148, § 60), does not acquire title to the real estate of the husband. (*Foster v. Townshend*, 60 N. Y. 203). A receiver's title is subject to any attachments levied before his appointment. (*Dunlop v. Patterson F. Ins. Co.*, 74 N. Y. 145). A receiver gets no title to property assigned under the assignment act of 1877 (Chap. 466, Laws 1877), where the assignment was acknowledged and perfected before his appointment. (*Nicoll v. Spowers*, 105 N. Y. 1). A

receiver is not entitled to rents and profits, which have been paid to the owner of the equity of redemption at the time of his appointment. (*Wyckoff v. Scofield*, 98 N. Y. 475). A resident of the state, or a person having an office within the state for the regular transaction of business, in person, who becomes the owner of a judgment by virtue of an appointment as a receiver, may file with the clerk, in whose office the judgment roll is filed, a notice of his appointment, and of his ownership of the judgment, subscribed by him, adding his place of residence, and if he resides without the state, his office address. Such notice has the same force and effect, as a lien upon real property, as if it was an assignment of the judgment. (Co. Civ. Proc. § 1263).

Sec. 3. Powers of Receiver.

Every receiver of the property and effects of the debtor, shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands and rents, belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of a debtor, where it is necessary or proper for him to do so; and he may apply for and obtain an order of course that the tenants of any real estate, belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver and pay their rents to him. He shall also be permitted to make leases from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor, without the special order of the court, until after judgment in the cause. He is not to be allowed for the costs of any suit, brought by him against an insolvent, from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. But he may, by leave of the court, sell such desperate debts, and all other doubtful

claims to personal property, at public auction, giving at least ten days' public notice of the time and place of such sale. (General Rule 77). No receiver shall have power to employ more than one counsel, except under special circumstances, and in particular cases requiring the employment of additional counsel, and in such cases, only upon special application to the court, showing such circumstances by his petition or affidavit, and on notice to the party or person on whose behalf or application he was appointed. No allowance shall be made to any receiver for expenses paid, or made, or incurred in violation of this rule. (General Rule 81). He should not employ an attorney who has been employed by either of the parties to the action in which the receiver was appointed (*Cumming v. Egerton*, 9 Bosw. 684; *Corey v. Long*, 12 Abb. Pr. N. S. 427); but a stranger cannot object that the receiver has employed an improper attorney. (*Warren v. Sprague*, 11 Paige, 200). The receiver, being the mere instrument or hand of the court, has the right at any time to apply to the court for instructions as to his duties under the order of the court, and the court will advise and afford him all necessary protection. A receiver is not to be disturbed without leave of the court, and an action cannot be brought against him without such leave. It is contempt of court for a third person to attempt to deprive him of his possession by force, or even by suit or other proceeding, without the permission of the court by which the receiver was appointed. (*Corey v. Long*, 12 Abb. Pr. N. S. 427, 435). Where a receiver has been dispossessed by the act of a third party, not sanctioned by the court, an attachment may issue against such third party, and he may not only be punished for the contempt, but compelled to restore the property. (*Noe v. Gibson*, 7 Paige, 513). Unless appointed under a special statute for a specific purpose, the receiver has no authority or power, except such as is conferred upon him by the order of his appointment, or the course and practice of the courts. (*Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438, 452). It is improper to give the receiver a general power to sue, and defend actions

touching the receivership property in the order appointing him. (*Witherbee v. Witherbee*, 17 App. Div. 181). The court should, in each instance, pass upon the question whether the claim is a proper one for the receiver to press, or defend. (*Troy Savings Bk. v. Morrison*, 27 App. Div. 423). He has no power to appoint a deputy receiver, to be paid out of the fund, except by special order of the court. (*Corey v. Long*, 12 Abb. Pr. N. S. 427). A receiver may become a consenting creditor, under an order of a justice of the supreme court, in proceedings for an insolvent's discharge. (Co. Civ. Proc. § 2153). An order appointing a receiver has no extra-territorial effect, and does not confer upon him authority to go into a foreign jurisdiction, and take possession of property by virtue of such order; but if the property be voluntarily surrendered to him, he acquires the right of possession, as against the party surrendering, but not as against the creditors in the other state, who still have the right to seize the property. (*O'Callaghan v. Fraser*, 37 Hun, 483). Where a receiver is appointed upon the death of the sole surviving executor, he has, subject to the direction of the court, the like power as an administrator with the will annexed. (Co. Civ. Proc. § 1869). A receiver cannot sue in a foreign jurisdiction for the property of the debtor. (*Booth v. Clark*, 17 How. [U. S.] 322). It has been held that a receiver of a foreign corporation may sue to recover property situate within this state; subject to the qualification that the foreign law shall not divest the title of a citizen here which has been fairly acquired. (*Barclay v. Quicksilver Min. Co.*, 6 Lans. 25). The receiver may continue an action commenced in the name of the corporation (*Albany City Ins. Co. v. Van Vranken*, 42 How. Pr. 281), or appeal from an order in an action against the corporation, either in his own name or that of the corporation. (*People v. Troy Steel & Iron Co.*, 82 Hun, 303). But the receiver has no better rights than the corporation had. (*Cutting v. Damerel*, 88 N. Y. 410). The receiver of a national bank may sue one of its directors, to recover damages sustained through

gross negligence. (*Brinckerhoff v. Bostwick*, 88 N. Y. 52). A receiver appointed in a foreclosure suit, of the rents and profits, has no power without an order of the court, to lessen the funds in his hands by expenditures for repairs. (*Wyckoff v. Scofield*, 103 N. Y. 630). A receiver should not bring suit without the authority of the court (*Foster v. Townshend*, 68 N. Y. 203); and a suit cannot be maintained by a receiver in sequestration proceedings (Co. Civ. Proc. § 1772) without such leave (*Garden v. Garden*, 34 Misc. 97); but where authorized to bring an action he may bring it in such court as he selects, unless directed by the court to bring it in a particular court. (*Rockwell v. Merwin*, 45 N. Y. 166). A receiver cannot make a payment without the authority of the court. (*Duffy v. Casey*, 7 Robt. 79). He cannot continue the business unless he is authorized to do so. (*Appleton v. Welch*, 20 Misc. 343). A receiver has power to bring and maintain an action to set aside a fraudulent transfer of, or charge upon, personal property or the income thereof, made by the party of whose estate he is receiver and for damages caused by such acts to his estate. (The Personal Property Law [Laws of 1897, Chap. 417] § 28; *Porter v. Williams*, 9 N. Y. 142; *Manley v. Rassiga*, 13 Hun, 288); and he may compel rival claimants of funds in his hands to interplead (*Winfield v. Bacon*, 24 Barb. 154); and he may institute summary proceedings to recover the possession of premises, after a refusal to pay rent. (*Matter of Renwick*, 1 Law Bull. 19). The death or removal of the receiver does not abate an action, but it may be continued by his successor. (Co. Civ. Proc. § 766). It is not a jurisdictional defect, under the provisions of this section, that the action is continued in the name of the old receiver after his successor has been appointed; the case may be prosecuted under the name of the original plaintiff unless one of the parties applied for a substitution. (*Hegewisch v. Silver*, 140 N. Y. 414). The section applies to statutory receivers only. (Id.).

Sec. 4. How Controlled.

A receiver is an officer of the court, and is controlled by it (*Lottimer v. Lord*, 4 E. D. Smith, 183); and he is entitled to its instructions as to his duty (*Matter of Van Allen*, 37 Barb. 225); and he will be protected in acts done in good faith and in obedience to an order of the court. (*Matter of Home Provident Safety Fund Assn.* 129 N. Y. 288; *Pfeffer v. Kling*, 58 App. Div. 179). The receiver should follow the directions of the court, and not those of the person at whose instance he is appointed. (*Lottimer v. Lord*, *supra*). Such directions are to be given only in the action in which he was appointed. (*Merritt v. Sparling*, 88 Hun, 491). A receiver, being the officer of the court, his duty is merely to protect the property or fund during the litigation; his acts are the acts of the court when duly sanctioned; but when not so sanctioned, they have no greater effect than those of unauthorized officers or agents. (*Negus v. City of Brooklyn*, 1 Civ Proc. Rep. 471). He must act for the benefit of all parties interested in the action (*Corey v. Long*, 43 How. Pr. 492; *affd.* 53 N. Y. 641); but on the application of one, not a party to the suit, the court will give such directions as may be necessary to protect his rights. (*Vincent v. Parker*, 7 Paige, 65). Where a receiver has been ordered to pay money to a certain person, he cannot withhold it because he has a personal claim against such person. (*McGarry v. Smith*, 2 Law Bull. 7). The court may compel a receiver to pay the wages of employees in preference to other debts. (The Labor Law [Laws 1897, Chap. 415] § 8; *Met. Trust Co. v. T. V. & C. R. R. Co.*, 103 N. Y. 245). As the funds in the hands of the receiver are in the custody of the court, it is unnecessary for a claimant to file a bill in equity, but payment may be directed on a summary application. (*People v. Bank of Dansville*, 39 Hun, 187). The court may at any time, either with or without the consent of the receiver, in order to save litigation or expense, compel the settlement of claims, or order a reference to ascertain the same. (*Guard. Sav. Inst. v. Bowling Green Sav. Bank*, 65 Barb. 275). A receiver, who is authorized by the court

to sue, is bound to proceed with the action; and he should not be restrained by an injunction issued out of another court. (*Winfield v. Bacon*, 24 Barb. 154). The court has jurisdiction of a suit against a receiver begun without leave, and can grant such leave *nunc pro tunc* (*Hirshfeld v. Kallischer*, 81 Hun, 606); but suing a receiver without leave of the court is a contempt (*Taylor v. Baldwin*, 14 Abb. Pr. 166; *Greene v. Odell*, 43 App. Div. 608); but if the receiver when sued, fails to apply to the court for protection, the action may be continued, as though permission to bring the same had been obtained from the court. (*Camp v. Barney*, 4 Hun, 373). The proper course, in case a receiver is sued without the permission of the court, is for him to apply to the court for an injunction restraining the plaintiff from proceeding. (*Matter of Schnyler's Steam Tow Boat Co.*, 136 N. Y. 169; reversed on another point, 154 U. S. 256; *Camp v. Barney*, *supra*). But where an action has been commenced, it should not be restrained simply on the ground that a prior judgment has disposed of the matters involved; but the receiver should be left to set that fact up as a defense to the action. (*Jay's Case*, 6 Abb. Pr. 293). Where a receiver begins a suit, and both the plaintiff in interest and the defendant unite in a petition, stating that such suit is in fraud of justice, and that fact is not denied, the court will order the suit discontinued. (*Merritt v. Lyons*, 16 Wend. 405).

Sec. 5. Liabilities.

As a general rule, a receiver is personally liable for the costs of an action brought by him without leave of the court, where judgment is recovered against him (*Smith v. Woodruff*, 6 Abb. Pr. 65); and especially is this rule true when he brings the action, or defends it, knowing that there is no sufficient evidence to sustain his position (*Bourdon v. Martin*, 74 Hun, 246; *affd.* without op., 142 N. Y. 669); or without having funds from which costs could be paid; that fact alone should be conclusive evidence of his bad faith, and should be deemed sufficient to charge him personally with the costs. (*Cumming v. Egerton*, 9 Bosw. 684). Where a receiver is,

guilty of mismanagement or bad faith in the prosecution or defense of an action, and judgment in said action goes against the receiver, the court may direct that the costs shall be paid by the receiver personally. (Co. Civ. Proc. § 3246). Before the receiver can be charged personally with costs, he is entitled to notice of an application for such relief. (*First Natl. Bk. v. Washburn*, 20 App. Div. 518). The liability of a receiver ceases immediately upon his discharge; and the court no longer can exercise control over him, except through the ordinary processes of the law available to all suitors (*Matter of N. Y. and W. U. Tel. Co. v. Jewett*, 115 N. Y. 166); but where irreparable damage will ensue by reason of such discharge, the court may, upon the petition of a creditor, vacate the order of discharge, and reinstate the petitioner to the position he occupied before the discharge. (Id.). For a receiver's personal misconduct or neglect he is personally liable; but for the neglect or misconduct of those employed by him in the performance of the duties of his trust, he is liable only in his official capacity. (*Camp v. Barney*, 4 Hun, 373). He is personally liable for the conversion of property belonging to a third party, although he takes it innocently and in the belief that it belongs to his trust. (*Fallon v. Egberts Woolen Mills Co.*, 56 App. Div. 585). If he continues an action commenced before his appointment, the fund in his hands is chargeable with costs, as though he were plaintiff (*Columbian Ins. Co. v. Stevens*, 37 N. Y. 536); but if he brings an action in a matter personal to himself, he is personally liable. (*Chapin v. Thompson*, 4 Hun, 779). A receiver who prosecutes an action under the direction of the court, stands on the same footing in respect to costs, as an executor or administrator; and he is not liable for costs for not proceeding to trial, where a good reason is shown for not trying, in pursuance of notice or stipulation. (*St. John v. Denison*, 9 How. Pr. 343). If the receiver sues without leave of the court, to recover a debt or claim or demand, to which he is entitled as such, he is not personally liable for costs unless ordered to pay costs by the court. (*Marsh v. Hussey*, 4 Bosw. 614). If in a creditor's suit, the

receiver sues in the debtor's name to recover property, the creditor at whose instance the suit is brought, is liable for the costs, as being the person beneficially interested. (*McHench v. McHench*, 7 Hill, 204). A receiver is not obliged, and cannot be compelled to account to a party; he is only obliged to account to the court. (*Musgrove v. Nash*, 3 Edw. 172). Where a receiver mixes his private funds, or the funds of another trust with the funds in his hands as receiver, or uses or loans the money, he is chargeable with interest; and if his profits from the use of such funds exceed interest, he may be charged with the profits. (*Utica Ins. Co. v. Lynch*, 11 Paige, 520). While approving of the rule just given, the court of appeals reversed an order charging a receiver with interest beyond what he had actually received from an unauthorized investment of the trust fund, on the ground that the receiver appeared to have acted in good faith, and without wrong intention, or personal benefit; and that the fund had been benefited and not harmed. (*Atty. Genl. v. North Am. L. Ins. Co.*, 89 N. Y. 94). The liability of the ordinary chancery receiver for the rent of buildings occupied during such receivership seems a much-disputed question among the judges of this state. It can be safely said, however, that there is no legal liability by virtue merely of his appointment and possession under his appointment. (*Stokes v. Hoffman House*, 46 App. Div. 120; *affd.* 167 N. Y. 554). For a full discussion of the question, see the various opinions in this case.

Sec. 6. Compensation.

A receiver, except as otherwise specially prescribed by statute is entitled, in addition to his lawful expenses, to such a commission, not exceeding five per centum upon the sums received and disbursed by him, as the court by which, or the judge by whom he is appointed, allows. But if in any case the commissions of a temporary or permanent receiver, so computed, shall not amount to one hundred dollars, said court or judge may, in its or his discretion, allow said receiver such a sum, not exceeding one hundred dollars, for his commissions as

shall be commensurate with the services rendered by said receiver. Any receiver, required by law to give a bond as such, may include as a part of his lawful commissions such reasonable sum not exceeding one per centum per annum upon the amount of such bond paid his surety thereon as such court or judge allows. (Co. Civ. Proc. § 3320). The only statutory provision for the compensation of a temporary receiver is the foregoing section. (*Matter of Smith Co.*, 31 App. Div. 39). Within the limit fixed by the statute the court has the authority to determine the compensation, and will fix the same at a reasonable sum. (*Baldwin v. Easler*, 34 Super. 274). Where the receiver has been guilty of acts of misconduct and neglect, he should be allowed no compensation whatever (*Clapp v. Clapp*, 49 Hun, 195), but his reasonable attorney's fees should be allowed. (Id.). A receiver is not allowed for costs of any suit, brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. (General Rule 79). The court will protect the rights of the receiver, and of his attorney or counsel to compensation out of the fund (*Clark v. Binninger*, 1 Abb. N. C. 421); it was so held in a case where after the appointment of the receiver, an assignee in bankruptcy took control of the action. (Id.). If by consent, all property is ordered to be delivered over to the receiver, he is entitled to commissions on all the property, whether converted into money or not. (*Bennett v. Chapin*, 3 Sand. 673).

Sec. 7. How Discharged or Removed.

Any person having an interest, and feeling that it would be endangered by the appointment of an improper person as receiver, may immediately apply for a change of receiver (*In re Bowery Bank*, 16 How. Pr. 56); but no motion can be made, or other proceeding had for the removal of a receiver, elsewhere than in the judicial district in which the order for his appointment was made (General Rule 80); and a receiver cannot be removed without notice, and an opportunity to be heard.

(*Campbell v. Spratt*, 5 Wk. Dig. 25). The court may revoke an appointment before it is consummated, and such revocation is not appealable. (*Siney v. N. Y. Con. Stage Co.*, 18 Abb. Pr. 435). The court will revoke an appointment procured by fraud or collusion. Presumptively, such appointment endangers the rights of creditors, and when such appointment is so procured, the court will not even stop to inquire whether such fraud and collusion had resulted in the selection of a suitable person or not; an appointment so procured would be presumed to be an improper one. (*Lottimer v. Lord*, 4 E. D. Smith, 183). So, in a case where one was appointed a receiver without notice to all parties, and sold the property at private sale to a brother of the plaintiff, at an inadequate price, before the defendants had been served with summons, the order appointing him was vacated as in fraud of the rights of creditors, and the sale was set aside. (*Simmons v. Wood*, 45 How. Pr. 262). Where the receiver and the judgment debtor in a creditor's suit both die, the court may appoint a new receiver. (*Nicoll v. Boyd*, 90 N. Y. 516). The court has power to remove a receiver appointed in an action, and to appoint another receiver, where the first has neglected his duty, and to direct the first receiver to account for property received by him, and deliver the same to the second receiver (*Connelly v. Krets*, 8 Wk. Dig. 480; app. dismissed, 78 N. Y. 620); but the court should direct the accounting by the first receiver before his discharge, as after his discharge the court can no longer exercise control over him as such receiver (*Matter of N. Y. & W. U. Tel. Co. v. Jewett*, 115 N. Y. 166); but the court may direct such accounting and delivery to the second receiver, without removing the first. (*Connelly v. Krets*, *supra*). The employment by the receiver of the judgment debtor to collect a portion of the estate, is not in itself, ground for his removal. (*Ross v. Bridge*, 15 Abb. Pr. 150). Where a motion is made to substitute one receiver for another, the question of the regularity of the appointment of the first receiver is not a matter to be considered on such motion (*Fassett v. Tallmadge*, 13 Abb. Pr. 12); nor will irregularities in

the appointment of a receiver, be ground for his discharge, where a party entitled to move, neglects to do so for an unreasonable time. (*Nicoll v. Boyd*, 14 Wk. Dig. 340; app. dismissed, 90 N. Y. 516). The fact that the action in which the receiver was appointed, is discontinued, does not therefore discharge the receiver; but he may thereafter on that ground apply for his discharge. (*Whiteside v. Prendergast*, 2 Barb. Ch. 471).

ARTICLE IV.

RECEIVERS OF CORPORATIONS.

SECTION.

1. In what cases appointed.
2. General powers and duties.
3. Changing or discharging receivers.
4. Commissions.

Sec. 1. In What Cases Appointed.

Subdivision 1.—UNDER THE CODE.

Jurisdiction to appoint receivers of corporations is wholly statutory. (*Decker v. Gardner*, 124 N. Y. 334). It has been noted, heretofore in this chapter, that the power of a court of chancery to appoint a receiver *pendente lite*, of the property which is the subject-matter of litigation either of an individual or of a corporation, is still inherent in the supreme court, regardless of statutory provision. In this article it is planned to deal only with the purely statute-given power of the court, to sequester corporate property by means of a receivership.

A receiver of the property of a corporation can be appointed only by the court, and in one of the following cases:

1. An action brought as prescribed in sections seven-hundred and eighty-one to eighteen hundred and three, inclusive.
2. An action brought for the foreclosure of a mortgage, upon the property of which the receiver is appointed, where the mortgage debt or the interest thereon

has remained unpaid, at least thirty days after it was payable, and after payment thereof was duly demanded of the proper officer of the corporation; and where either the income of the property is specifically mortgaged, or the property itself is probably insufficient to pay the mortgage debt.

3. An action brought by the attorney general, or by a stockholder to preserve the assets of a corporation, having no officer empowered to hold the same.

4. A special proceeding for the voluntary dissolution of a corporation. (Co. Civ. Proc. § 1810).

Where the receiver is appointed in an action otherwise than by or pursuant to a final judgment, notice of the application for his appointment must be given to the proper officer of the corporation. (Id.).

The section above quoted applies to an action or a special proceeding against a corporation, or a joint stock association, created by or under the laws of the state, or a trustee, director, or other officer thereof; or against a corporation, or joint stock association, created by or under the laws of another state, government, or country, or a trustee, director, or other officer thereof, where the corporation or association does business within the state, or has, within the state, a business agency or a fiscal agency, or an agency for the transfer of its stock. (Co. Civ. Proc. § 1812). The receiver of a corporation represents both it and its creditors and stockholders. (*Atty. Genl. v. Guardian Mut. L. Ins. Co.*, 77 N. Y. 272). Under section eighteen hundred and ten, the court has the right to entertain an action brought by a stockholder of a foreign corporation, for the appointment of a receiver of its property in this state, on the ground of its insolvency (*Woerishoffer v. North Riv. Con. Co.*, 99 N. Y. 398); but it has no power to appoint a receiver of the property of a corporation, whether domestic or foreign, upon the commencement of an action by a creditor at large, on behalf of himself and of all others similarly situated. (*Lehigh Coal Co. v. Central R. R. of N. J.*, 43 Hun, 546). On the application of a stockholder, a receiver may be appointed of the property of an insolvent fire insurance company. (*Osgood v. Maguire*, 61

N. Y. 524). A receiver of a religious corporation cannot be appointed in an action by one corporator, against individual corporators, to which action the corporation is not made a party. (*Groesbeeck v. Dunscomb*, 41 How. Pr. 302). Nor can a receiver be appointed, after the return of an execution unsatisfied upon motion or petition; but such appointment must be in an action, and by the supreme court on notice (*Clinch v. Southside R. R. Co.*, 1 Hun, 636); but notice is not necessary, where the receiver is appointed by or pursuant to final judgment. (Co. Civ. Proc. § 1810). When appointed, the order cannot be vacated by consent, but it must be by motion. (*People v. Globe Mut. L. Ins. Co.*, 60 How. Pr. 82). Where a receiver has been appointed in proceedings to compel the dissolution of a corporation, an application to determine the rights of a person to share in the assets, must be made in the district where the receiver was appointed. (*Rinn v. Astor F. Ins. Co.*, 59 N. Y. 143). In an action to procure the dissolution of a corporation, the court may, at any stage of the action, appoint one or more receivers of the property of the corporation. (Co. Civ. Proc. § 1788). In an action by the people to annul a corporation, the court by its final judgment must provide for the appointment of a receiver. (Co. Civ. Proc. § 1801). By virtue of its general powers, the court may entertain proceedings against corporations, and appoint temporary receivers of them. (*Bangs v. Duckinfield*, 18 N. Y. 592). In proceedings for the voluntary dissolution of a corporation, if it shall be made to appear to the satisfaction of the court that the corporation is insolvent, the court may at any stage of the proceedings before final order on a specified notice and motion appoint a temporary receiver of the property of the corporation, which receiver shall have all the powers and be subject to all the duties that are defined as belonging to temporary receivers appointed in an action, in section 1788 of the code, unless the court confers upon him some, or all, of the duties and powers of a permanent receiver. (Co. Civ. Proc. 2423). In such proceedings if it appears to the court, upon the application for a final order therein, that the corporation is

insolvent, or for any reason, a dissolution of the corporation will be beneficial to the interests of the stockholders, and not injurious to the public interests, the court must make a final order dissolving the corporation, and appoint one or more receivers of its property. But in the case of a solvent corporation, the court may if there is no objection by creditors, dispense with a receiver and provide in the final order for the distribution of the assets. (Co. Civ. Proc. § 2429). The insolvency specified in sections 2423 and 2429 is limited and defined by section 2419, as meaning when "the stock, effects and other property of the corporation are not sufficient to pay all just demands for which it is liable or to afford a reasonable security to those who may deal with it." (*Matter of Lenox Corporation*, 57 App. Div. 515; *affd.* without op., 167 N. Y. 623). The only authority for appointing a temporary receiver of a corporation at the commencement of a proceeding for the voluntary dissolution thereof is section 2423, and if this statutory authority be not followed strictly, the appointment is void. (*Id.*). The presentation of a proper petition, however, gives the court jurisdiction, and formal defects in the order appointing the receiver can be amended *nunc pro tunc*. (*Matter of Christian Jensen Co.*, 128 N. Y. 550). All of the estate, real and personal of such corporation shall vest in such [permanent] receiver, or receivers from the time of filing security, and they shall be trustees of such estate, for the benefit of the creditors and of the stockholders (Rev. Stat. Pt. 3, Ch. 8, T. 4, § 67 [Banks & Bros. 9 Ed. Vol. 2, p. 1910]); and such receivers may assert the rights of the creditors, or stockholders, when necessary. (*Gillet v. Moody*, 3 N. Y. 479). The directors of a banking corporation, of which the superintendent of banks has taken possession under section 17, of the banking law, and for the dissolution of which he has directed the attorney general (in accordance with the provisions of section 18 of that law) to begin an action, cannot defeat such an action by voluntary dissolution proceedings, even though such proceedings are begun before the action; accordingly, the appointment of temporary receivers in the proceeding is

unauthorized and void, and the persons sought so to be appointed cannot hold the property of the corporation as against receivers appointed in the attorney general's suit. (*Matter of Murray Hill Bank*, 153 N. Y. 199). Section forty-two, and sections sixty-six to eighty-nine, inclusive, of part three, chapter eight, title four, of the revised statutes are made applicable to a receiver, appointed as prescribed in section twenty-four hundred and twenty-nine, above quoted. (Laws 1880, Chap. 245; 2 Rev. Stat., Banks & Bros., 9 Ed. pp. 1908, 1910-1914). Proceedings for the voluntary dissolution of a corporation must be strictly followed. (*Chamberlain v. Roch. Seamless P. V. Co.*, 7 Hun, 557). While a receiver's title in such case vests from the time of filing security, it relates back to the time of his appointment; and if he was appointed pursuant to an order of reference, it relates back to the time of granting such order. (*Matter of Berry*, 26 Barb. 55). All transfers made after that time are void as to him. (*Id.*). If, however, by the terms of the statute, the receiver is vested with the estate "from the time of filing the security required by law," his title vests only from such time; and the court cannot overreach the statute in that regard, so as to vest his title by relation back to the date of the order. (*Chamberlain v. Roch. Seamless P. V. Co.*, 7 Hun, 557). The title vests absolutely in him; and a judgment creditor cannot take the property on execution. (*Chapman v. Douglas*, 5 Daly, 244). He takes the whole of the estate, although only appointed at the instance, or on behalf, of a single creditor. All the other creditors are given an opportunity to come in, before the distribution of the fund. (*Rinn v. Astor F. Ins. Co.*, 59 N. Y. 143).

Subdivision 2.—UNDER SPECIAL STATUTE.

If it is made to appear upon application of any creditor or shareholder in any banking corporation, company or association, residing in this state that the funds on deposit with the superintendent of banks are insufficient to pay in full the creditors and shareholders residing in this state, or that it is insolvent, or has sus-

pended business, or that insolvency or bankruptcy proceedings have been taken against it either voluntarily or involuntarily, the supreme court may, upon due notice to the attorney general, and upon such notice to the corporation, company or association as the court shall prescribe, appoint a receiver of such funds; and pending such application, the court or any judge thereof may enjoin the commencement or prosecution of any other action or proceeding against such corporation, company or association. Upon the qualification of such receiver, the superintendent of banks shall pay over to him the funds remaining in his hands less any charges which he may have against the same, and the receiver shall distribute such funds among the creditors and shareholders of the corporation, company or association residing in this state in the manner prescribed by law for the payment of creditors in the case of the voluntary dissolution of a corporation. (The Banking Law, § 33).

A court has no authority, upon the application of a creditor at large, to appoint a receiver in an action to dissolve a manufacturing corporation (*Galwey v. U. S. Steam Sugar Ref. Co.*, 36 Barb. 256); nor where the effect would be to remove all the directors, where insolvency is not charged, nor a dissolution asked (*Belmont v. Erie Ry. Co.*, 52 Barb. 637); nor where the plaintiffs do not show themselves entitled to have a dissolution of the corporation (*Denike v. N. Y. & R. Lime Co.*, 80 N. Y. 599); nor on a contest between parties claiming to hold property as trustees of an association, unless there is a danger to the fund, or bad faith is shown. (*Willis v. Corlies*, 2 Edw. 281). If at any time the affairs of any life, health or casualty corporation shall, in the opinion of the superintendent of insurance, appear to be in such a condition as to render the issuing of additional policies and annuity bonds by the corporation injurious to the public interests, such corporation shall be deemed insolvent and the superintendent shall report the fact to the attorney general, who shall bring such action or institute such proceeding as may be authorized by law to be taken against an insolvent insurance corporation. If in any such action or proceed-

ing it shall appear to the satisfaction of the court that the assets and funds of the corporation are not sufficient to justify its further continuance of the business of insuring lives, granting annuities and incurring new obligations as authorized by its charter, it shall enjoin and restrain the corporation from the further transaction of its business and appoint a receiver of its assets and credits, who, upon filing his bond to the people of the state in an amount and with sureties approved by the court, conditioned for the faithful performance of his duties, shall take possession of all such assets and credits, including all securities deposited in the insurance department. (The Insurance Law, § 76). There are similar provisions as to life or casualty insurance corporations upon the co-operative or assessment plan. (The Insurance Law, §§ 207, 208). All orders appointing receivers of corporations, shall designate therein, one or more places of deposit, wherein all funds of the corporation, not needed for immediate disbursement, shall be deposited, and no deposits or investments of such trust funds shall be made elsewhere, except upon the order of the court, upon due notice given to the attorney general. (Laws 1883, Chap. 378, § 3). This refers only to receivers of insolvent corporations. (*U. S. Trust Co. v. N. Y. West Shore & B. R. R. Co.*, 101 N. Y. 478). Where an action is brought by the attorney general in the name of the people, pursuant to the laws of 1886, to wind up the affairs of a corporation, which has been annulled and dissolved by legislative enactment, it is the duty of the special term of the supreme court in the county designated in the summons and complaint, or of any judge of said court, who resides in the judicial department in which said county is situated, upon the presentation of a certified copy of the act of the legislature annulling and dissolving a corporation, and of the summons and complaint founded thereon, immediately to appoint a receiver of the assets and property of such dissolved corporation, to be both temporary and permanent receiver thereof. (Laws 1886, Chap. 310, § 3).

Subdivision 3.—APPLICATION, WHERE MADE.

All motions for the sequestration of the property of corporations, or for the appointment of receivers thereof, must be made in the judicial district in which the principal place of business of said corporations, respectively, is situated, except that in actions brought by the attorney general, in behalf of the people of this state, when it shall be made to appear that such sequestration is a necessary incident to the action, and that no receiver has already been appointed, a motion for the appointment of one may be made in any county within the judicial district in which such action is triable. And where a receiver has been appointed, his appointment shall be extended to any subsequent suit or proceeding relating to the same estate or property, in which a receiver is necessary. (General Rule 80). This rule has been limited by statute in cases of insolvent corporations, as follows: Every application made after April 11, 1883, for the appointment of a receiver of a corporation, other than applications made by the attorney general on behalf of the people of the state, shall be made at a special term of the court, held in and for the judicial district, in which the principal business office of the corporation is located; and all such applications made by the attorney general shall be made in the judicial district in which the action in which the appointment is sought is triable; and any action or proceeding hereafter brought by the attorney general on behalf of the people of the state against any corporation for the purpose of procuring its dissolution, the appointment of a receiver, or the sequestration of its property, may be brought in any county of the state, to be designated by the attorney general. (Laws of 1895, Chap. 282). The statute last cited amended section one of chapter 378 of the laws of 1883. It has been held that the act of 1883, above cited, related exclusively to receivers of corporations appointed in proceedings in case of insolvency; and does not apply to receivers of corporations in other cases. (*U. S. Trust Co. v. N. Y. West Shore & B. R. R. Co.*, 101 N. Y. 478). General Rule eighty (then rule

eighty-one) was also limited by the case of *Smith v. Danzig* (3 Civ. Proc. Rep. 127), which held that a receiver of a corporation may be appointed in the county in which the action is brought, notwithstanding said rule; as the rule cannot have the effect of preventing a party from suing in the county where he resides. All applications to the court contemplated in the act of 1883, shall be made in the judicial district where the principal office of the insolvent corporation was located, excepting such applications as are made in actions brought by the attorney general on behalf of the people of the state, and all such applications shall be made in the judicial district in which the action is triable. (Laws 1896, Chap. 282, amending Laws 1883, Chap. 378, § 9). The necessary effect of these statutes is that the venue of all actions or proceedings in such actions, other than those instituted by the attorney general, shall be laid in the county and district where the principal office of such corporation is located. The case of *Smith v. Danzig* (*supra*), correctly states the rule in cases other than of insolvent corporations. So where an application is made for the appointment of a receiver of mortgaged property, pending an action to foreclose a mortgage upon a railway, the application for such receivership may still be made in the district in which the venue is laid. (*U. S. Trust Co. v. N. Y. West Shore & B. R. R. Co.*, 35 Hun, 341). Notice of the application for the appointment of a receiver of a corporation, must be given to the proper officer of the corporation, unless it is by or pursuant to a final judgment. (Co. Civ. Proc. § 1810). In every action or proceeding for the dissolution of a corporation, a copy of all motions, and all motion papers, and a copy of any other application to the court with a copy of the proposed order or judgment, shall be served on the attorney general; and any order or judgment, granted without such service, shall be void. (Laws 1883, Chap. 378, § 8). Under this section, the service of the motion papers, etc., on the attorney general, in a judgment creditor's action against a railroad company for the appointment of a receiver, and the

sequestration of its property, is jurisdictional; and an omission to do so, renders the appointment of the receiver therein void (*Whitney v. N. Y. & Atlantic R. R. Co.*, 32 Hun, 164); and such appointment may be vacated upon motion, by a receiver duly appointed in an action to foreclose a mortgage upon the corporate property; although he has not been made a party to the creditor's action. (*Id.*).

In an action to procure the dissolution of a corporation, a receiver may be appointed at any stage of the action. (Co. Civ. Proc. § 1788). That section renders useless a certain line of authorities which hold that a receiver in such cases could not be appointed until after certain proceedings had been taken; as, the return of an order to show cause; or the report of a referee. A receiver will not be appointed *ex parte* on the application of a creditor; but an order to show cause, and a temporary injunction will be granted (*Devoe v. Ithaca & Owego R. R. Co.*, 5 Paige, 521); but if the corporation voluntarily appear, the court obtains jurisdiction to dissolve it. (*Atty. Genl. v. Guardian Mut. L. Ins. Co.*, 77 N. Y. 272). The necessity for the appointment of a receiver must be shown (*City of Rochester v. Bronson*, 41 How. Pr. 78); but the proceedings on such appointment can only be corrected by appeal. (*Bangs v. Duckinfield*, 18 N. Y. 592).

Subdivision 4.—WHO MAY BE RECEIVER OF A CORPORATION.

Any person of full age who resides within this state, and who has the ability requisite to the performance of the duties, and who can give the necessary security, may be appointed receiver of a corporation, unless for some particular reason he is disqualified from acting. In case of the voluntary dissolution of a corporation, the court may in its discretion, appoint a director, trustee, or other officer, or a stockholder of the corporation, a receiver of its property. (Co. Civ. Proc. § 2429). Where an action is brought by the attorney general in the name of the state, for the purpose of winding up the affairs of

a corporation, which has been dissolved and annulled by legislative enactment, no officer, director, or stockholder of such corporation shall be appointed receiver thereof. (Laws 1886, Chap. 310). The appointment of a trustee of an insolvent corporation as receiver, will be set aside, when it appears to have been made in a collusive action, brought subsequent to an action seeking to charge the trustees. (*Wilson v. Barney*, 5 Hun, 257). For most, if not all, purposes a receiver takes the place, and stands as the representative of the corporation. He is as much bound by an act which the corporation has the power to do, as it is itself. He cannot impeach or disaffirm the lawful and authorized acts of the corporation. (*U. S. Trust Co. v. N. Y. West Shore & B. R. R. Co.*, N. Y. Daily Reg. Oct. 2, 1884).

Subdivision 5.—SECURITY.

Ordinarily the question of the security to be given by a receiver of a corporation, is left entirely to the discretion of the court. In the case of a voluntary dissolution of a corporation, the receiver shall give such security to the people of the state, as the court shall direct. (Rev. Stat. Pt. 3, Ch. 8, T. 4, § 66 [Banks & Bros. 9 Ed. Vol. 2, p. 1910]). Where a temporary receiver has been appointed in such proceedings and given the bond required by the court, it is not necessary for him to furnish a further bond on being continued as permanent receiver. (*Jones v. Blun*, 145 N. Y. 333). The sureties on the bond of a temporary receiver appointed in voluntary dissolution proceedings are liable thereon, even though his appointment has been annulled for insufficiency of the petition. (*Thompson v. Denuer*, 16 App. Div. 160). Where a receiver is appointed in an action brought to wind up the affairs of a corporation, annulled and dissolved by legislative enactment, he is required to give a bond with sureties, to be approved by the court or judge appointing him, in a penalty to the people of the state of not less than ten thousand dollars. (Laws 1886, Chap. 310).

Sec. 2. General Powers and Duties.

A receiver appointed in an action to dissolve a corporation before final judgment, is a temporary receiver, until final judgment is entered. A temporary receiver has power to collect and receive the debts, demands and other property of the corporation; to preserve the property and proceeds of the debts and demands collected; and to sell, or otherwise dispose of the property, as directed by the court; to collect, receive and preserve the proceeds thereof; and to maintain any action or special proceeding, for either of these purposes. He must qualify as prescribed by law for the qualification of a permanent receiver. Unless additional powers are conferred upon him, as prescribed in section seventeen hundred and eighty-nine of the code of civil procedure, a temporary receiver has only the powers specified in this section, and those which are incidental to the exercise thereof. A receiver, appointed by or pursuant to a final judgment in the action, or a temporary receiver, who is continued by the final judgment, is a permanent receiver, and has all the powers and authority conferred, and is subject to all the duties and liabilities imposed upon a receiver appointed upon the voluntary dissolution of a corporation. (Co. Civ. Proc. § 1788). Under this section the court has power to empower the receiver to "finish and complete the outstanding contracts" of the corporation. (*Nason Mfg. Co. v. Garden*, 52 App. Div. 363). Not only has a temporary receiver power, under this section, but it is also his duty, to sue for the recovery of money obtained from the corporation by way of fraudulent preferences. (*Nealis v. Am. Tube & Iron Co.*, 150 N. Y. 42). The assets in the hands of such a temporary receiver, however, are not liable for debts of a corporation incurred before his appointment (*Mercantile Trust Co. v. Kings Co. El. R. Co.*, 40 App. Div. 141), though such assets may be charged with the payment of the necessary current expenses of the receiver. (*Farmers' L. & T. Co. v. Mer. Tel. Co.*, 148 N. Y., 315). A temporary receiver, appointed as prescribed in the section just quoted, is in all respects subject to the control of the court. There seems to be no statutory pro-

vision for an accounting by such a temporary receiver. (*Matter of Simonds Mfg. Co.*, 39 App. Div. 576). In addition to the powers conferred upon him by the provisions of that section, the court may, by the order or interlocutory judgment appointing him, or by an order subsequently made in the action, or by the final judgment, confer upon him the powers and authority, and subject him to the duties and liabilities of a permanent receiver, or so much thereof as he thinks proper; except that he shall not make any distribution among the creditors or stockholders, before final judgment, unless he is specially directed to do so by the court. (Co. Civ. Proc. § 1789). A receiver, appointed by or pursuant to an order or judgment, in an action in the supreme court, or a county court, or in a special proceeding for the voluntary dissolution of a corporation, may take and hold real property, upon such trusts, and for such purposes as the court directs, subject to the direction of the court from time to time, respecting the disposition thereof. (Co. Civ. Proc. § 716). In all cases, where receivers have been or shall be appointed for any corporation of this state, other than an insurance company, on application by the attorney general, all property real and personal, and all securities of every kind and nature belonging to such corporation, no matter where located, or by whom held, shall be transferred to and vested in and held by such receiver; provided, however, that such transfer shall only be made, when directed by an order of the supreme court; due notice for such an application having been served on the attorney general, and the custodian of the funds, security, or property. (Laws 1884, Chap. 285). Where a life insurance company, or annuity company, or any corporation of the class provided for by article two of the insurance law, entitled "life, health and casualty insurance corporations," whether formed under said article or prior thereto, has been or hereafter may be dissolved, and a receiver thereof appointed, all securities or funds, deposited by such company, prior to dissolution, with the superintendent of the insurance department, may be transferred to the receiver of such company, by an order

of the supreme court at special term, held within the judicial district where the principal office of such company is located, upon the application of the attorney general, and after service of eight days written notice upon the superintendent of the insurance department. Such funds and securities shall thereupon be delivered to, and the title thereto vest immediately in such receiver; who shall convert such securities and funds into money, and distribute the proceeds thereof among the respective policy holders entitled thereto, ratably, according to the value of such policies. The same rules govern in the case of the dissolution of a foreign corporation, doing insurance business of the kind mentioned above, except that the order for the transfer of the deposit may be made either in the judicial district in which the principal office of the corporation in this state was located at the time of the commencement of the action or proceeding, or in the third judicial district. (Laws 1896, Chap. 322, amending Laws 1884, Chap. 285, § 2). A receiver, appointed in an action to wind up the affairs of a corporation, which has been annulled and dissolved by legislative enactment, shall, immediately after his appointment, and after giving security, make and file in the office of the clerk of the county where the action is pending, an inventory of the property of such corporation, and for the purpose of ascertaining the extent, nature and location of such property, he has power to compel the attendance of witnesses; and all evidence taken by him shall be filed in said clerk's office. He shall also immediately publish in two newspapers, a notice to the creditors of such corporation, to present their claims and demands to such receiver, at a time and place designated in such notice; and the receiver is authorized to examine witnesses on oath, as to all matters pertaining to any claim or demand presented. He shall thereafter make and file a list of all claims, which list shall be verified by his oath, and presented to the court for its order, directing a sale of the property specified in the inventory, at public auction. (Laws 1886, Chap. 310, §§ 4, 5). A receiver appointed in such case, has full power and authority

to administer oaths to all witnesses, and to any creditor of such dissolved corporation. All applications for leave to sue such receiver, or for an injunction to restrain his proceedings, must be made to the supreme court, in the county in which the action in which he was appointed, was brought, and upon eight day's notice to the attorney general. (Id. § 10). A receiver, appointed in proceedings in equity against a corporation, shall possess all the powers and the authority conferred, and be subject to all the obligations and duties imposed, upon receivers, appointed in case of the voluntary dissolution of a corporation; and he shall keep an account of all moneys received by him, and make verified reports thereof at stated intervals, showing the amount of money he has received, and the amount he has a right to retain, and the distributive share of each person interested therein. He shall pay such distributive share to such person on demand, after the filing of such statement. In case he neglects or refuses to comply with any duty imposed upon him, the supreme court, upon the application of the party aggrieved, shall forthwith remove such receiver, and appoint a suitable person in his place; unless such neglect or refusal shall be satisfactorily explained to the court. Such receiver shall be charged ten per centum on all moneys due to such party, and retained by him more than one day after such demand. (Rev. Stat. Pt. 3, Ch. 8, T. 4, § 42 [Banks & Bros. 9 Ed. Vol. 2, p. 1908]). A receiver, appointed on the voluntary dissolution of a corporation, has all the power and authority, and is subject to the same duties and obligations, so far as applicable, as are conferred by law upon trustees to whom an assignment of the estate of insolvent debtors may be made, pursuant to the revised statutes. (Rev. Stat. Pt. 3, Ch. 8, T. 4, § 68 [Banks & Bros., 9 Ed. Vol. 2, p. 1910]). A receiver duly appointed in this state by and pursuant to a judgment in an action or order in a special proceeding, may be authorized by the court to sell or convey the real and personal property of the corporation of which he is the receiver upon such terms and conditions as the court may direct. (Laws 1898, Chap. 522). A receiver, appointed

upon the voluntary dissolution of a corporation, should proceed immediately to collect all sums remaining unpaid upon any share of stock subscribed, unless the person so subscribing shall be wholly insolvent; he must give notice of his appointment, requiring persons to present claims at a time and place specified; and he shall have the same power to settle any controversy, arising between him and the debtors or creditors by reference, as is given to trustees of insolvent debtors. He shall call a meeting of the creditors of the corporation, within four months after his appointment, at which time all accounts and demands shall be ascertained and adjusted, and the amount of moneys in his hands declared. And he may cancel and discharge any subsisting contract or engagement of a contingent nature, with the consent of the party holding such engagement, upon the terms prescribed by law; and after deducting enough to pay his commissions, and to meet necessary expenses of pending suits, if there be any, or for the purpose of canceling and discharging any open or subsisting engagement, he shall distribute the residue of the moneys according to law. (Rev. Stat. Pt. 3, Ch. 8, T. 4, § 69, 89 [Banks & Bros., 9 Ed. Vol. 2, pp. 1910, 1914]). These sections do not apply to a temporary receiver. (*Matter of Simonds Mfg. Co.*, 39 App. Div. 576). Upon the appointment of a receiver of a corporation organized under the laws of this state and doing business therein, other than a moneyed corporation, the wages of the employes of such corporation shall be preferred to every other debt or claim. (The Labor Law [Laws 1897, Chap. 415], § 8). If the whole of the estate be not distributed on the first dividend, the receiver shall within one year thereafter, make a second dividend, which shall be made in all respects in the same manner as the first; and in such second dividend, the receiver shall not be liable to any creditor, or any person having a claim against the corporation, unless presented before the second dividend. If there remains any sum in the hands of the receiver after the second dividend, it shall be distributed among the stockholders in proportion to their respective interests. Such receiver is subject at

all times to the direction of the court, and he may be compelled to account at any time; and he may be removed; and any vacancy caused by his removal, or his death may be supplied by the court. Within three months after the time prescribed for the second dividend, he must render a full account to the court on oath, of all the proceedings taken by him; and if any moneys come to his hands after the rendering of such account, he shall from time to time render account of the same. (Rev. Stat., Pt. 3, Ch. 8, T. 4, §§ 80-86 [Banks & Bros., 9 Ed. Vol 2, pp. 1912, 1913]). A receiver of a mutual insurance company has full power to make assessments on premium notes belonging to such corporation, as by charter the directors thereof had authority to make; and notice of the assessment is given in the same manner; and he shall have the like rights and remedies in consequence of the non-payment thereof, as are given to the directors thereof by the charter of such corporation. He may receive a voluntary surrender of all policies issued by the corporation, or cancel them, where by the charter, the directors would be authorized to do so. (3 Rev. Stat. Banks & Bros., 9 Ed. pp. 2126, 2127). It shall be the duty of every receiver of an insurance, banking or railroad corporation, or trust company, to present every six months to the special term of the supreme court, held in the judicial district wherein the place of trial or venue of the action or special proceeding in which he was appointed may then be, on the first day of its first sitting, after the expiration of such six months, and to file a copy of the same, if a receiver of a bank or trust company, with the bank superintendent; if a receiver of an insurance company, with the superintendent of insurance; and in each case with the attorney general, an account exhibiting in detail the receipts of his trust, and the expenses paid and incurred therein during the preceding six months; and it shall be unlawful for any receiver of the character specified in this section to pay any attorney or counsel any costs, fees or allowances until the amounts thereof shall have been stated to the special term in this manner, as expenses incurred, and shall have been approved by that court, by

an order of the court duly entered; and any such order shall be the subject of review by the appellate division and the court of appeals on an appeal taken therefrom by any party aggrieved thereby. Of the intention to present such an account, as aforesaid, the attorney general and also the surety or sureties, on the official bond of such receiver, shall be given eight days notice in writing; and the attorney general shall examine the books and accounts of such receiver at least once every twelve months. (Laws 1896, Chap. 139). The statute last cited amended the act of 1883 in relation to receivers for corporations (Laws 1883, Chap. 378, § 4); which act has been held to relate only to insolvent corporations (*U. S. Trust Co. v. N. Y. West Shore & B. R. R. Co.*, 101 N. Y. 478), therefore it must be construed also to relate exclusively to such corporations. The receiver of an insolvent corporation represents both its creditors and stockholders, and when necessary may exercise the rights possessed by them. (*Gillet v. Moody*, 3 N. Y. 479). And being such trustee for their benefit, if a fraudulent claim or demand is presented, it is his duty to so administer the assets that the fraudulent indebtedness shall have no share in the distribution. (*McParland v. Bain*, 26 Hun, 38). He is vested with all the rights which the corporation had when he was appointed, and can sue for a tort committed before his appointment (*Gillet v. Fairchild*, 4 Denio, 80); but he cannot disaffirm the lawful acts of the corporation. (*Hyde v. Lynde*, 4 N. Y. 387, 392).

A receiver, appointed under section seventeen hundred and eighty-eight of the code of civil procedure, is vested with all the property and effects of the corporation, and has full power to sell and dispose of the same, and to settle its affairs (*Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438); but where appointed on the application of a judgment creditor, simply to protect the property, his powers are only those conferred upon him by the court. (*Mann v. Pentz*, 3 N. Y. 415). Unpaid stock subscriptions pass to the receiver, and may be sold by him. (*Dean v. Biggs*, 25 Hun, 122; *affd.* without op., 93 N. Y. 662). He may, also, enforce the liabil-

ity of the directors to make good a misapplication of assets. (*Mason v. Henry*, 152 N. Y. 529). Where notes were made by a resident of another state, but payable in this state, a receiver is entitled to recover upon them, although after the appointment of the receiver, the debt was attached by a creditor of the corporation in the other state. (*Osgood v. Maguire*, 61 N. Y. 524). A receiver of an insolvent insurance company has been held not to be entitled to the securities deposited by it with the insurance department for the protection of the policy holders (*Matter of Guardian Mut. L. Ins. Co.*, 13 Hun, 115); but in that case their proceeds were directed to be distributed among the policy holders. This seems to be changed by statute, and that now upon the application of the attorney general the court will make an order delivering them to the receiver, to convert into money and distribute among the policy holders. (Laws 1884, Chap. 285, as amended by Laws 1896, Chap. 322). The receiver of a life, health or casualty insurance company, appointed pursuant to the provisions of section 76 of the insurance law, must immediately appoint a competent actuary, approved by the superintendent of insurance, to make a careful investigation and report concerning the condition of the company, and his future duties are specifically defined, according to the report of the actuary. (The Insurance Law, § 77). The receiver of a domestic insurance company may re-insure, upon the written consent of the superintendent of insurance and the attorney general, all of the policy obligations of the corporation, obtaining an order of the court directing such reinsurance. (The Insurance Law, § 23). A receiver cannot allow a set-off against a debt owing to the bank, where the demand was assigned to the debtor after the appointment of the receiver, for that purpose. (*VanDyck v. McQuade*, 85 N. Y. 616). A receiver of a corporation may be invested by the court with a general authority and power to compromise disputed claims (*Matter of Croton Ins. Co.*, 3 Barb. Ch. 642); and there can be no compromise without his consent. (*Atty. Gen. v. Life & F. Ins. Co.*, 4 Paige, 224). If there is danger that the fund will be unfairly distrib-

uted, the receiver may apply to the court for its protection. (*People v. Security L. Ins. & Ann. Co.*, 79 N. Y. 267). A receiver should allow all claims against the corporation which he is satisfied are legally and justly due, and which may be recovered by a suit against the corporation. (*Atty. Gen. v. Life & F. Ins. Co.*, 4 Paige, 224). Where an action has been brought by the corporation, to compel the payment on a subscription of stock, the action may be continued by the receiver after his appointment, in the name of the original party (*Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294); and one, who has acted as director in such corporation, is estopped from denying the existence of the corporation, or the validity of his subscription. (*Id.*). Such an action, however, does not apply to mutual insurance companies, as they have no stock. (*Williams v. Lakey*, 15 How. Pr. 206). Where a receiver, appointed in an action against a corporation, fraudulently obtains an order for the sale of a debt due the corporation, a creditor may maintain an equitable action to vacate the order, and set aside the sale. (*Hackley v. Draper*, 60 N. Y. 88). And if a judgment has been obtained against a corporation, a receiver may have it set aside by the court, if it was obtained by collusion or fraud, or without consideration. (*Whittlesey v. Delaney*, 73 N. Y. 571.) The receiver of a domestic corporation will be required to pay the costs out of the fund, where plaintiff obtained a judgment against him, in an action brought against the corporation before his appointment; the expense of such action being incurred for the benefit of the fund. (*Locke v. Covert* 42 Hun, 484). So, where the receiver of a bank elected to continue a suit at law commenced by the corporation, and was non-suited, he was required to pay out of the fund, the whole cost of the defendant, before as well as after he assumed control of the suit. (*Camp v. Niagara Bank*, 2 Paige, 283). Where the stockholders or trustees of a corporation become personally liable for their debts, under statutory provisions, the right to enforce the payment of such debts, is exclusively in the creditors, and not in the receiver. (*Mason v. N. Y. Silk Mfg. Co.*, 14 Wk. Dig.

451). A receiver of a foreign corporation, appointed in another state, may dispose of the property of such corporation within this state, and of the debts due such corporation in this state. (*Hoyt v. Thompson*, 5 N. Y. 320). A receiver should act, contract and convey in his own name, as receiver, and not in that of the corporation of which he is the receiver (*Id.*); but where he is directed by the order, appointing him, to continue the business of the corporation as long as is necessary to wind it up, he is not personally liable upon an obligation he assumed as receiver. (*Olpherts v. Smith*, 54 App. Div. 514; *Sager Mfg. Co. v. Smith*, 45 App. Div. 358). In the absence of any such provision in the order of appointment, he is personally liable if he continues the business. (*Meyer v. Lexow*, 1 App. Div. 116).

Sec. 3. Changing or Discharging Receivers.

The power of the supreme court to remove its own receiver of a corporation, and appoint another in his place, does not depend on any notice to stockholders who have appeared; the court can act on its own motion. (*Hoyt v. Continental Ins. Co.*, 21 Wk.^d Dig. 145). In case of the voluntary dissolution of a corporation, the receiver may be removed by the court, and a vacancy caused by his removal or death may be supplied by the court. (Rev. State Pt. 3, Ch. 8, T. 4, § 85 [Banks & Bros., 9 Ed. Vol. 2, p. 1913]). The attorney general may, at any time he deems that the interests of the stockholders, creditors, policy holders, depositors, or other beneficiaries, interested in the proper and speedy distribution of the assets of any insolvent corporation, will be subserved thereby, make a motion in the supreme court, at a special term thereof in any judicial district, for an order removing the receiver of any insolvent corporation, and appointing a receiver thereof in his stead; or to compel him to account, or for such other and additional order or orders as to him may seem proper, to facilitate the closing up of the affairs of such receivership; and any appeal from any order, made upon any motion under this section, shall be to the general term of said court, of the department in which said motion

is made. (Laws 1883, Chap. 378, § 7). Where the attorney general intervenes to secure the removal of a receiver, all the parties to the action in which he was appointed, are entitled to notice of such application. (*Attrill v. Rockaway B. Imp. Co.*, 25 Hun, 376; S. C. 13 Wk. Dig. 348). Notice should be served on all parties who have appeared. (Id.). No motion for the discharge of a receiver can be made, or other proceeding had for his removal, elsewhere than in the judicial district in which the order for his appointment was made. (General Rule 80). And where a motion is made to discharge a receiver of an insolvent corporation, it shall be made in the district where the principal office of the insolvent corporation is located, excepting such applications as are made in actions brought by the attorney general on behalf of the people of the state, and all such applications shall be made in the judicial district in which the action is triable. (Laws 1896, Chap. 282, amending Laws 1883, Chap. 378, § 9); and except that upon an application by the attorney general, the motion may be made in any judicial district, for an order removing the receiver, and appointing another in his stead. (Id. § 7). It is not a matter of course to change a receiver upon his own application, unless his duties are ended. He must show some reasonable cause why he should be relieved. (*Beers v. Chelsea Bank*, 4 Edw. 277). Where one of the directors of a company was shown to have known of and acquiesced in the mismanagement for which a suit had been begun, and with being improperly interested in contracts made by the company; it was held, that he was not a proper person to exercise the powers of a receiver; and that his appointment should be revoked; and that the fact that the suit was instituted for his benefit, would not justify his being continued as receiver. (*Keeler v. Brooklyn Elev. R. R. Co.*, 9 Abb. N. C. 166). The court loses its direct control of the receiver after his discharge; but where it appears that irreparable damage will ensue by reason of such discharge, the court may vacate the discharge, and reinstate the parties as they were before the discharge.

(*Matter of N. Y. & W. U. Tel. Co. v. Jewett*, 43 Hun, 565; *affd.*, 115 N. Y. 166).

Sec. 4. Commissions.

The subject of the compensation or commissions to which a receiver of a corporation is entitled, is in a rather confused condition, and it is often difficult to ascertain what statute controls. (*Matter of Orient Mut. Ins Co.*, 50 N. Y. St. Rep. 460). The code does not distinguish between the compensation of a receiver of a corporation, and that of an individual; simply providing that a receiver, except as otherwise specially prescribed by statute, is entitled to such a commission, in addition to his lawful expenses not exceeding five per centum upon the sums received and disbursed by him, as the court by which, or the judge by whom he is appointed, allows. (Co. Civ. Proc. § 3320). This section is the only statutory provision on the subject of the commission of a temporary receiver. (*Matter of Smith Co.*, 31 App. Div. 39). Every receiver shall be allowed to receive as compensation for his services as such receiver, five per centum for the first one hundred thousand dollars received and paid out, and two and one-half per centum on all sums received and paid out in excess of the said one hundred thousand dollars. But no receiver shall be allowed or shall receive, from such percentages or otherwise, for his said service for any one year any greater sum or compensation than twelve thousand dollars nor for any period less than one year more than at the rate of twelve thousand dollars, unless the court upon proper notice shown to said receiver makes an extra allowance not to exceed two and one-half per centum upon the sum received and paid out, provided that where more than one receiver shall be appointed, the compensation herein provided shall be divided between said receivers. (Laws 1883, Chap. 378, § 2, as amended by Laws 1886, Chap. 275, and Laws 1901, Chap. 506). The language of both the original section, and the same as amended, while being general in form, has been construed to refer exclusively to permanent receivers appointed for insolvent

corporations. (*U. S. Trust Co. v. N. Y. West Shore & B. R. R. Co.*, 101 N. Y. 478). A receiver, appointed on the voluntary dissolution of a corporation, is entitled to such commissions, in addition to his actual disbursements, as the court shall allow; not exceeding the sum allowed by law to executors. (Rev. Stat. Pt. 3, Ch. 8, T. 4, § 76 [Banks & Bros., 9 Ed. Vol. 2, p. 1912]). This provision covers only the commissions of a permanent receiver of a dissolved corporation. (*Matter of Smith Co.*, 31 App. Div. 39). A receiver, appointed in an action brought to wind up the affairs of a corporation, which has been annulled and dissolved by legislative enactment, is entitled to two per cent upon the whole amount received by him from the sale of the property described in the inventory, for his compensation; and he is also entitled to his disbursements, including witness fees, and fees for the service of subpoenas, and a reasonable counsel fee for such counsel as the receiver may find it necessary to employ. (Laws 1886, Chap. 310, § 6). In no case has the court power to award the receiver any compensation beyond that allowed by the statute. (*Matter of Orient Mut. Ins. Co.*, 50 N. Y. St., Rep. 460). In computing the commission of a receiver of a corporation, upon his resignation, it has been held that only the actual amount of the money which has come into his hands should be the basis of compensation (*People v. Mut. Benefit Assts.* 39 Hun, 49); but, more recently, a divided court (in another department and without referring to the last cited case) has decided that the whole estate in his hands is the basis for the calculation. (*Matter of Smith Co.*, *supra*). Where a receiver was appointed and qualified, but the business was continued by the parties in interest, so as to involve no liability on the part of the receiver; and he exercised only a supervision over it; and his accounts were kept by a clerk paid for by the corporation, he was held to be entitled to commissions only upon the property actually received, and distributed by him personally. (*Matter of Woven Tape Skirt Co.*, 85 N. Y. 506). A receiver of a mutual insurance company is entitled to his commissions on the value of premium notes, which have come

into his hands, and which he has surrendered to the makers under order of the court. (*Van Buren v. Chango Co. Mut. Ins. Co.*, 12 Barb. 671).

ARTICLE V.

DEPOSIT, DELIVERY OR CONVEYANCE.

Where it is admitted by the pleading, or examination of a party, that he has in his possession, or under his control, money, or other personal property capable of delivery, which, being the subject of the action or special proceeding, is held by him as trustee for another party, or which belongs or is due to another party, the court may, in its discretion, grant an order, upon notice, that it be paid into, or deposited in court, or delivered to that party, with or without security, subject to the further direction of the court. (Co. Civ. Proc. § 717). The court has no power to make an order under this section in an action for the recovery of money alleged to belong to the plaintiff and to be in the possession of the defendant, although it is claimed that the defendant is insolvent. (*Balestier v. Metropolitan Nat. Bank*, 43 Hun, 564). Where the court has directed a deposit or delivery, as prescribed in the above section, or where a judgment directs a party to make a deposit or delivery, or to convey real property; if the direction is disobeyed, the court, besides punishing the disobedience as a contempt, may, by order, require the sheriff to take, and deposit, or deliver the money or other personal property, or to convey the real property, in conformity with the direction of the court. (Co. Civ. Proc. § 718). Where a party brings money into court, pursuant to its direction, he is discharged thereby from all further liability, to the extent of the money so paid in. (Co. Civ. Proc. § 743).

ARTICLE VI.

GENERAL PROVISIONS.

SECTION.

1. Electing between provisional remedies.
2. Time for deciding motions, limited.
3. Defendant's right to provisional remedies.

Sec. 1. Electing Between Provisional Remedies.

Where an application for an order, of arrest, an injunction, and a warrant of attachment, or two of them is made, in the same action, against the same defendant; and it satisfactorily appears, that, under the particular circumstances of the case, two or all of them are not necessary for the plaintiff's security, the court or judge may, in its or his discretion, require the plaintiff to elect between them. (Co. Civ. Proc. § 719). Where sufficient property of the defendant has been attached to satisfy plaintiff's claim, and an order of arrest, the propriety of which is questionable, has been issued, the plaintiff should be required to elect between the attachment, and the order of arrest. (*Duncan v. Guest*, 2 Civ. Proc. Rep. 275).

Sec. 2. Time for Deciding Motions, Limited.

Where an application has been made to obtain, vacate, modify, or set aside an order of arrest, injunction order, or warrant of attachment, the court or judge must finally decide the same, within twenty days after it is submitted for decision. (Co. Civ. Proc. § 719). But a plaintiff who has obtained a provisional remedy, cannot defeat a motion to vacate or modify it, by objecting that it has been held under consideration more than twenty days. (*Stafford v. Ambbs*, 8 Abb. N. C. 237). An order, referring to a referee a motion to vacate or modify a provisional remedy, is not void, though made twenty days after the motion to vacate or modify was made, and will not be set aside on that ground. (Id.).

Sec. 3. Defendant's Right to Provisional Remedies.

Where the defendant interposes a counter-claim, and thereupon demands an affirmative judgment against the plaintiff, his right to a provisional remedy is the same, as in an action brought by him against the plaintiff, for the cause of action stated in the counter-claim, and demanding the same judgment. And, for the purpose of applying to such a case the provisions of the code of civil procedure, the defendant is deemed the plaintiff, the plaintiff is deemed the defendant, and the counter-claim so set forth in the answer, is deemed the complaint. (Co. Civ. Proc. § 720).

CHAPTER XVIII.

TENDERS AND OTHER OFFERS.

ARTICLE I....Tender after suit.

ARTICLE II...Satisfaction of part of plaintiff's claim.

ARTICLE III..Offer to liquidate damages.

ARTICLE IV..Offer to compromise.

ARTICLE I.

TENDER AFTER SUIT.

SECTION.

1. When it may be made.
2. How to be made.
3. Effect of tender.
4. When to be deducted from recovery.
5. Payment into court.
6. Care and disposition of money paid into court.

Sec. 1. When it May be Made.

Where the complaint demands judgment for a sum of money only; and the action is brought to recover a sum certain, or which may be reduced to certainty by calculation; or to recover damages for a casual, or involuntary personal injury, or a like injury to property; the defendant, or his attorney, may, at any time before the trial, tender to the plaintiff, or his attorney, such a sum of money as he conceives to be sufficient to make amends for the injury, or to pay the plaintiff's demand; together with the costs of the action to that time. (Co. Civ. Proc. § 731). This section only authorizes a tender *after* the suit has been commenced (*Brown v. Ferguson*, 2 Denio, 196; *Wilson v. Doran*, 110 N. Y. 101); but the statutory provision on this subject has not eliminated the old common law tender which may be made before

suit brought. (*Brown v. Ferguson, supra; Cass v. Higenbotam*, 100 N. Y. 248, 253). The code of civil procedure seems to have made no radical change in the law of tender (*Cass v. Higenbotam, supra*), and it is hardly necessary, in our discussion of the subject, to differentiate between those made before, and those made after, the action began. A tender may be made in an action on a bond, which has been given for the payment of damages, on account of the accidental collision with the plaintiff's vessel. (*Slack v. Brown*, 13 Wend. 390). It cannot be made in an action for unliquidated damages, except those mentioned in the section. (*Dunning v. Humphrey*, 24 Wend. 31). Where it is made in an action, brought to recover damages for injuries, the judge or referee must certify, whether the injury was casual or involuntary. (*Slack v. Brown*, 13 Wend. 390). It does not apply to actions in equity. (*N. Y. Fire & Marine Ins. Co. v. Burrell*, 9 How. Pr. 398; *Pratt v. Ramsdell*, 16 Id. 59).

Sec. 2. How to be Made.

A proper and legal tender is not made if the person making the tender seeks to force his creditor to sign a satisfaction-piece (*Roosevelt v. Bull's Head Bank*, 45 Barb. 579), or to compel him to take the sum offered and acknowledge it as in full payment of the debt (*Noyes v. Wyckoff*, 114 N. Y. 204; *Shiland v. Loeb*, 58 App. Div. 565); the latter must be still free to prosecute his claim for more, if he wishes. (*Id.*). But where there is no dispute as to the amount of the debt, a tender may always be restricted by such conditions as by the terms of the contract are conditions precedent or concurrent to the payment of the debt (*Halpin v. Phenix Ins. Co.*, 118 N. Y. 165), as, for example, that a mortgage be discharged (*Wheelock v. Tanner*, 39 N. Y. 481), or that certain collateral be given up (*Cass v. Higenbotam*, 100 N. Y. 248; *Ocean Nat. Bk. v. Fant*, 50 N. Y. 474), or the return of a negotiable note (*Smith v. Rockwell*, 2 Hill, 482; *Cutler v. Gould Co.*, 43 Hun, 516), or of a bond and coupons (*Bailey v. County of Buchanan*, 115 N. Y. 297). The tender must be made in actual legal

tender money; but a tender of the amount by a check is good, if it is not refused upon the ground that it is not legal tender. (*Duffy v. O'Donovan*, 46 N. Y. 223; *Wright v. Robinson & Co.*, 84 Hun, 172). The party, to whom the tender is made, is entitled to time to examine the money, to see if it is a legal tender, or if it is such money as he is willing to receive. (*Harris v. Mulock*, 9 How. Pr. 402). An offer to pay is not a tender, unless the plaintiff knowing that the defendant actually has the money to pay in his possession, refuses to accept it, in which case, he waives an actual offer of the money. (*Bakeman v. Pooler*, 15 Wend. 637; *Strong v. Blake*, 46 Barb. 227). A refusal to accept a formal tender if made, excuses one from making it (*Blewett v. Baker*, 58 N. Y. 611); where there is a willingness, and an ability to perform there need be no actual tender thereof, if performance has been waived or prevented (*Nelson v. Plimpton F. P. El. Co.*, 55 N. Y. 480); and it seems that it may be dispensed with by some positive act or declaration (*Bakeman v. Pooler*, 15 Wend. 637; *Lawrence v. Miller*, 86 N. Y. 131, 137; *Murr v. Western Assurance Co.*, 50 App. Div. 4); but, as in making proof of the tender under such circumstances, it would be necessary for the defendant to prove that the plaintiff knew that the defendant had the money in his possession, and peremptorily refused to receive it, it is not safe to rely on a tender, without a production of the money; and the money should always be produced, and actually tendered. If the tender is rejected on a particular ground, which is specified, no other objection which could have been obviated can be relied upon to defeat it. (*Duffy v. O'Donovan*, 46 N. Y. 223). The tender should be made to the plaintiff, or to his attorney, or to some person who is authorized to receive it in behalf of the plaintiff. (*Grussy v. Schneider*, 50 How. Pr. 134; *affd.* 55 How. Pr. 188; *Hargous v. Lahens*, 3 Sand. 213; *Co. Civ. Proc.* § 731). It may be made to one of several plaintiffs, if they are united in interest. (*Wyckoff v. Anthony*, 9 Daly, 417). A tender, made as prescribed in section seven hundred and thirty-one of the code of civil procedure, does not avail the defendant, unless the money is

accepted, or is paid into court, and notice thereof served in writing upon the plaintiff's attorney before the trial, and within ten days after the tender. If the plaintiff takes out the amount paid in, he accepts the tender. (Co. Civ. Proc. § 732). This section deals with tenders after suit (see page 754, *ante*), but the rule seems to be precisely the same with reference to common-law tenders; i. e., those made before the action was commenced. (*Brown v. Ferguson*, 2 Denio, 196; *Wilson v. Doran*, 110 N. Y. 101). To render the common-law tender effectual, the defendant, before or with his plea, must pay the money into court and serve notice upon the plaintiff's attorney of the fact (*Id.*); and a payment into court on the day of the trial is too late. (*Heywood Boot, etc. Co. v. Ralph*, 82 Hun, 418). The tender under the code is, of course, of no avail, unless it is paid into court, and notice thereof given, as prescribed by this section, and if notice is not given, the answer of tender may be returned as a nullity. (*Platner v. Lehman*, 26 Hun, 374). Although the tender is made with an allowable condition attached (as explained above), the obligation still rests upon the party making it of keeping the money at all times ready for payment when demanded (*Roosevelt v. Bull's Head Bank, supra*), and, when sued, of paying into court, in order to prevent a judgment on the indebtedness, or the recovery of costs. (*Halpin v. Phenix Ins. Co., supra*; *Osterman v. Goldstein*, 32 Misc. 676; *Riley v. Cheeseman*, 75 Hun, 387; *Nelson v. Loder*, 132 N. Y. 288). It may well be, however, that a tender which is not so kept good may still be effective in discharging a lien. (*Cass v. Higenbotam*, 100 N. Y. 248; *Nelson v. Loder, supra*; *Exchange Fire Ins. Co. v. Norris*, 74 Hun, 527). To make a payment into court, the precise sum and the identical money which was tendered, should be paid to the county treasurer to be delivered to the plaintiff, if he demands it, and notice that that has been done should be given to the plaintiff. (Co. Civ. Proc. §§ 745, 732). Where the tender is made by a check (unobjected to), a proper practice is to pay the amount in money into court. (*Wright v. Robinson Co.*, 84 Hun, 172; *Link v. Mack*, 25 Misc. 615). In his

answer, pleading a tender, the defendant should set up the payment into court. (*Becker v. Boon*, 61 N. Y. 317). If the defendant does not allege that fact, the answer is not sufficient. (*Knight v. Beach*, 7 Abb. Pr. N. S. 241); but if an answer, omitting such an allegation with reference to a tender before suit, is received and returned without raising an objection to the omission, the plaintiff may be deemed to have taken issue upon the plea of tender and waived the irregularity in this matter of practice. (*Smith v. Slosson*, 89 Hun, 568). It was held in *Becker v. Boon* (*supra*), that, where the answer contained other defenses in addition to that of the tender, there would be no such waiver, but the case does not seem to have been followed, as in *Wilson v. Doran* (110 N. Y. 101), as well as in *Smith v. Slosson* (*supra*), the answers set up other defenses. It is to be borne in mind that, while the necessity of the deposit and the allegation thereof in the answer may be so waived, there still exists the necessity of the production of the money at the trial to render the tender effectual. (*Knight v. Beach*, 7 Abb. Pr. N. S. 241, 247). In the case of the statutory tender, however, the notice of deposit is not a mere matter of practice but is an essential part of the prescribed statutory procedure, and no such waiver is to be inferred from the failure of the plaintiff to raise the question before trial. (*Wilson v. Doran*, *supra*).

Sec. 3. Effect of Tender.

The tender is an admission that the plaintiff is entitled to recover the amount tendered, but no more. (*Wilson v. Doran*, 110 N. Y. 101; *Spalding v. Vandercook*, 2 Wend. 431). The money deposited becomes the property of the plaintiff. (*Wilson v. Doran*, *supra*; *Becker v. Boon*, 61 N. Y. 317). And he is entitled to take it at any time; and he need not wait until final judgment in the action. The plaintiff is entitled to take it, no matter what may be the event of the action *Kelly v. West*, 36 Super. 304); and the defendant cannot in any event have the money back. (*Taylor v. Brooklyn El. R. R. Co.*, 119 N. Y. 561). If it appears

upon the trial, that the sum so tendered was sufficient to pay the plaintiff's demand, or to make amends for the injury, and also to pay the costs of the action to the time of the tender, the plaintiff cannot recover costs or interest from the time of the tender, but must pay the defendant's costs from that time. (Co. Civ. Proc. § 733). After the tender and payment into court, the only question to be litigated is whether the plaintiff has established a cause of action for more than the amount of the tender; if the plaintiff does not prove that he is entitled to more than the amount paid into court, there should be a non-suit, or a verdict for the defendant. (*Dakin v. Dunning*, 7 Hill, 30; *Wilson v. Doran*, *supra*). If the plaintiff shows that he is entitled to more than the amount paid in, he should have a verdict, for the whole amount of his claim. (*Kelly v. West*, 36 Super. 304; *Dakin v. Dunning*, 7 Hill, 30). In other words, the plaintiff runs a risk, after a tender and deposit, of paying defendant's costs if the recovery falls short of the amount tendered; while the defendant runs the risk of losing the amount of moneys deposited in event of his success upon the ensuing trial. (*Taylor v. Brooklyn El. R. R. Co.*, 119 N. Y. 561).

Sec. 4. When to be Deducted from Recovery.

If the plaintiff proceeds in the action, after accepting the tender, the sum accepted must be deducted from the recovery, and judgment rendered for the residue, if any; and if the tender and acceptance do not appear in the pleadings, a memorandum thereof must be annexed to the judgment roll. The plaintiff's right to recover costs, and his liability to pay costs to the defendant, are determined by the amount of the residue. (Co. Civ. Proc. § 734). The amount of the residue, after deducting the tender, is regarded as the full amount of the plaintiff's recovery, for the purpose of fixing his right to costs, so that if the residue is less than fifty dollars, the defendant will recover costs, unless the action is one of those in which a justice of the peace has no jurisdiction. (Co. Civ. Proc. §§ 2863, 3229, subd. 3).

Sec. 5. Payment into Court.

The right of the defendant to pay money into court, when no tender has been made, was the subject of discussion in the case of *Wilson v. Doran* (39 Hun, 88), in which Mr. Justice Bradley, delivering the opinion of the court, discussed the subject fully; and the rest of this section is substantially a quotation from his opinion delivered in that case.

“At common law, payment of money may, when tender has been made before suit, and when no tender has been made, be paid into court; and when so paid into court, the money becomes that of the plaintiff, and the defendant cannot in any event of the action, take it out. (*Murray v. Bethune*, 1 Wend. 191; *Malcolm v. Fullerton*, 2 Durn. & E., 645, 648). The payment into court during the pendency of the action, without tender, required a rule to that effect, which was as a matter of course, entered before plea, and after that special leave by order was required. (*Griffiths v. Williams*, 1 Durn. & E. 710; *Dunlap v. Commercial Ins. Co.*, 1 Johns. 149; *Baker v. Hunt*, 1 Wend. 103). And if the plaintiff accepted and took the money, he was entitled to costs up to the time of payment into court. But if he proceeded to trial, and was finally entitled to no more than the amount so paid in, he was allowed no costs, but was required to pay the defendant's costs subsequent to the payment into court. (*Stevenson v. York*, 4 Durn. & E. 10; *Kabell v. Hudson*, Id. 11; *Burstall v. Horner*, 7 Id. 368; *Aikins v. Colton*, 3 Wend. 326). Payment into court is an admission of liability upon the cause of action alleged, to the extent of the amount so paid in; and it is not important for that purpose, whether it follows and is pursuant to tender before suit, or paid in during its pendency, without previous tender; beyond that his (defendant's) liability to pay may be contested. (*Cox v. Parry*, 1 Durn. & E. 464; *Long v. Greville*, 4 Dowl. & Ry. 632; *Reid v. Stenton*, 5 B. & Ad. 499; *Meager v. Smith*, 4 Id. 673; *Spalding v. Vandercook*, 2 Wend. 431; *Berdan v. Greenwood*, 3 Exch. Div. 251; *Hawksley v. Bradshaw*, 5 Q. B. Div. 302). And in either case (whether paid into court pursuant to such tender, or

after the commencement of the action, by virtue of what was known as a common rule entered for the purpose), if the plaintiff fail to establish a right to recover a greater sum than that paid in, the defendant was entitled to non-suit or verdict. (*Stevenson v. York*, 4 Durn. & E. 10; *Burstall v. Horner*, 7 Id. 368; *Archer v. English*, 1 Man. & Gr. 873; *Aikins v. Colton*, 3 Wend. 326; *Murray v. Bethune*, 1 Id. 191; *Dakin v. Dunning*, 7 Hill, 30; *Becker v. Boon*, 61 N. Y. 317, 322; *Platner v. Lchman*, 26 Hun, 374). This proposition is founded upon the reason that the payment into court is payment *pro tanto* of the claim alleged, and so much of it is in practical effect stricken out of the complaint. (*Bank of Cumberland v. Southerland*, 3 Cow. 336, 338). * * * When that is properly done, the plaintiff must establish a right to more than was tendered, or paid into court, or judgment will go against him. And the money in court is treated as a payment to him, and is his from the time it is so paid in. It is said that the payment into court is an admission of the cause of action alleged (*Johnson v. Columbia Ins. Co.*, 7 Johns. 315); but that rule has its qualifications. It is an admission only as to the amount paid in; except that when the action is upon a special contract, it also admits the contract, and breach alleged; and the question becomes one of damages only. (*Perren v. Monmouthshire R. R. Co.*, 11 C. B. 855; *Kingham v. Robbins*, 5 M. & W. 94; *Yate v. Willan*, 2 East, 134; limited by *Clark v. Gray*, 6 East, 564, 571; and see *Huntington v. American Bank*, 6 Pick, 340). Payment into court, upon a general count of *indebitatus assumpsit*, admits nothing more than liability for the amount so paid in. (*Perren v. Monmouthshire R. R. Co.*, 11 C. B. 855). * * * My attention is called to no statute, which seems to have the effect to abrogate the right and practice at common law of paying into court, pursuant to a rule or order, during the pendency of the action, without any tender having been made. The revisors' note on the subject does not indicate such purpose. (3 *Rev. Stat.*, 2 Ed. 779), and the court has treated the common law rule in that respect as remaining, by the application of it since

the statute. (*Dakin v. Dunning*, 7 Hill, 30).” (*Wilson v. Doran*, 39 Hun, 88). The judgment entered upon this opinion of the general term was reversed by the court of appeals (110 N. Y. 101), but only on a question not affecting the soundness of the reasoning found in the opinion below, which continues to be the best exposition of the law on this subject.

Sec. 6. Care and Disposition of Money Paid into Court.

All money, which has been paid into court in any action, is to be kept by the county treasurer of the county, or in New York city, by the chamberlain of that city. (Co. Civ. Proc. § 745). The comptroller of the state of New York shall supervise the administration of all the funds paid into any court of record, and shall prescribe regulations and rules for the care and disposition thereof, which shall be observed by all parties interested therein, unless the court having jurisdiction over the same, shall make different directions, by special order duly entered in accordance with section 747 of the code of civil procedure (Co. Civ. Proc. § 744); such funds shall be deposited with such bank, trust company, etc., as the state comptroller shall designate (Co. Civ. Proc. § 746); but the court may always direct, by an order or decree, concerning the disposition of such funds. (Co. Civ. Proc. § 747). When the court makes such special order, it must require the money to be paid to or invested by such trust company as has heretofore been designated by the supreme court, or as shall hereafter be designated by the the appellate division for that purpose. (General Rule 68). It is the duty of the attorney, upon whose motion the funds are brought into court, to file with the county treasurer [the city chamberlain in the city and county of New York] or with the bank or company, to whom the same are to be paid according to the order or judgment or according to the practice of the court, a certified copy of said order or judgment. (Id.). Orders upon the banks or other trust companies for the payment of moneys out of court shall be made to the order of the person entitled thereto, or of his attorney duly authorized, and shall specify in

what particular suit or on what account the money is to be paid out, and the time when the order authorizing such payment was made. No order in any pending action, for the payment of money out of court, shall be made, except on regular notice or order to show cause, duly served on the attorneys of all the parties who have appeared therein or filed notice of claim thereto. (General Rule 69). The draft upon the trust company for such moneys, or for interest thereon, must contain the title of the cause or matter on account of which the draft is made, and the date of the order authorizing such draft, and must be made payable to the order of the person or persons entitled to the money, or of his or their attorney, who is named in the order of the court authorizing such draft. (Id.). No money, security, or other property which shall have been placed in the custody of the court shall be surrendered without the production of a properly certified copy of an order of the court, in whose custody said money, security or other property shall have been placed, duly made and entered, directing such disposition. Each order must be countersigned by the presiding judge by whose direction it is made. (Co. Civ. Proc. § 751). Any attorney or other person procuring an order for the payment of money out of court, shall obtain two certified copies of the order, both to be countersigned by the judge granting the same; one copy shall be filed with the county treasurer [the city chamberlain in the city and county of New York] and the other shall accompany the draft drawn upon the depository and be filed with it, and the several banks and other depositories having trust funds of the court on deposit, are forbidden to pay out any such funds without the production and filing of such certified and countersigned copy order. (General Rule 69). One copy of an order directing periodical payments is sufficient for all the payments. (Id.).

ARTICLE II.

SATISFACTION OF PART OF PLAINTIFF'S CLAIM.

Where the answer of the defendant, expressly or by not denying, admits a part of the plaintiff's claim to be just, the court, upon the plaintiff's motion may, in its discretion, order that the action be severed; that a judgment be entered for the plaintiff for the part so admitted; and, if the plaintiff so elects, that the action be continued, with like effect as to the subsequent proceedings, as if it had been originally brought for the remainder of the claim. The order must prescribe the time and manner of the plaintiff's election. If the plaintiff elects to continue the action, his right to costs upon the judgment, is the same as if it was taken in an action brought for only that part of the claim. If the plaintiff does not so elect to continue the action, costs must be awarded as upon final judgment in any other case. (Co. Civ. Proc. § 511). This section is applicable alike to actions at law and suits in equity; so, where the answer in a foreclosure suit denies no part of the complaint but avers a payment not allowed in the complaint, the plaintiff may admit the payment and have judgment for the balance. (*Hall v. Holt*, 25 Hun, 277). Judgment may be ordered under this section, for a part of the entire claim, where the answer admits a specific sum to be due upon it. (*Quintard v. Secor*, 3 E. D. Smith, 614; *Wireman v. Remington S. M. Co.*, 39 Super. 314). And where the action is on several causes of action, to one of which the defendant interposes no defense, judgment may be ordered as to that one (*Russell v. Meacham*, 16 How. Pr. 193; *Bradbury v. Winterbottom*, 13 Hun, 536); if the answer does not contain counter-claims in an amount greater than that demanded in the complaint. (*Cronin v. Tebo*, 63 Hun, 190). But the answer must contain a plain, full and explicit admission that a definite sum is due to the plaintiff, and the amount stated must be certain (*Dolan v. Petty*, 4 Sand. 673; *Coursen v. Hamlin*, 2 Duer, 513); and the admission

must be that the plaintiff's claim as such is justly due. (*Burgess v. House*, 49 App. Div. 383). A judgment will not be ordered, where the answer denies the plaintiff's claim, and alleges that the plaintiff is not entitled to more than a sum named (*Dolan v. Petty*, *supra*); nor where it admits that he is entitled to a reasonable sum, without naming it (*Hildreth v. Carpenter*, 23 Wk. Dig. 354); nor where, to ascertain whether a specific sum is due, a critical examination of the pleadings, or of books and accounts is necessary (*Coursen v. Hamlin*, 2 Duer, 513); nor where a specific sum is admitted to be due conditionally upon the surrender of a draft, held as security. (*Foster v. Devlin*, 57 N. Y. Super. Ct. Rep. 120). But where the defendant tenders a certain sum, and offers judgment for that sum, the court will order a judgment for it, under section five hundred and eleven. (*Roosevelt v. N. Y. & Harlem R. R. Co.*, 45 Barb. 554). Where a fund in litigation has been brought into court, and the answer admits part of it to be due to the plaintiff, but disputes his claim to the residue, the court may order judgment for the sum admitted, without prejudice to the further claim of the plaintiff. (*Merritt v. Thompson*, 3 E. D. Smith, 599). Where a surviving partner, sued by the administrator of the deceased partner for an accounting, admits the balance in his hands due to such partner's estate, but makes claims against the decedent, and against the partnership, judgment may be ordered against him under that section, for such balance, less the claim against the decedent, upon the administrator's giving security to pay the decedent's proportion of the claims against the firm, and of the costs and expenses. (*Roberts v. Law*, 4 Sand. 642). Where the answer stated that the defendant, who was surety for the payment by the plaintiff of rent then in arrear, had received from him a sum of money to be applied on account of the rent, that defendant still held the same, and that no demand had been made for payment back, which he was willing to make, it was held to be an admission of a trust, and that it was proper to order a judgment for the amount admitted to have been received, under this section.

(*Burhans v. Casey*, 4 Sand. 706). In an action on a draft, where the answer alleged that it was given for the price of goods sold by the plaintiff, and set up breach of warranty, and a claim to recoup damages therefor of a part of the amount, judgment was ordered for the plaintiff for the residue of his claim, after deducting the amount claimed for damages. (*Baker v. Nussbaum*, 1 Hilt. 549). In an action for services, where the answer did not deny the plaintiff's claim, but only the value of the services, and alleged that the services were only worth a certain sum, judgment was ordered for that sum. (*Quintard v. Secor*, 3 E. D. Smith, 614). Judgment will not be ordered for the plaintiff under this section, where the whole claim is admitted. (*Slauson v. Conkey*, 10 How. Pr. 57; reversing S. C., 1 Abb. Pr. 228). It is not enough to authorize a judgment, that the defendant admits that he has a fund which the plaintiff seeks to recover, if he denies the plaintiff's right to the fund. (*Bender v. Sherwood*, 15 How. Pr. 258). Application for the order should be made to the court at special term, upon notice, although the court has power to grant an *ex parte* application. (*Shaw v. Coleman*, 54 N. Y. Super. Ct. Rep. 3). It may be made at any stage of the action. It is discretionary with the court in all cases, whether or not to exercise the power granted by this section. (*Lawton v. Shepherd*, 5 Wk. Dig. 319). The fact that an offer of judgment has been made and refused, is no reason for denying the motion. (*Quintard v. Secor*, 3 E. D. Smith, 614; *Bradbury v. Winterbottom*, 13 Hun, 536; *Wireman v. Remington S. M. Co.*, 39 Super. 314). Where the form of the action was such, that to order a judgment under this section, would subject the defendant to imprisonment under a body execution, the court refused to make the order. (*Slauson v. Conkey*, *supra*). The provision of the code of procedure upon that subject (Co. Proc. § 244) only gave the court authority to make an order for the payment of the money; but it provided that the order might be enforced as a judgment. Under this section it was held that a judgment might be ordered in the action for the amount which

was admitted to be due to the plaintiff. (*Duncan v. Ainslie*, 26 Barb. 199). The code of civil procedure, however, provides that judgment may be ordered for the amount due, and that the action may be severed; and the judgment so ordered is, of course, to be enforced like any other judgment, for the same cause of action. An appeal lies from a direction made under this section. (*Bradbury v. Winterbottom*, 13 Hun, 536; *Merritt v. Thompson*, 3 E. D. Smith, 599). Where there is an order of severance and judgment under this section, the plaintiff is not entitled to costs in such judgment unless he elects not to continue the action for the remainder of his claim. (*Waite v. Kaldenberg Co.*, 68 Hun, 528).

ARTICLE III.

OFFER TO LIQUIDATE DAMAGES.

SECTION.

1. When it may be made.
2. Effect of acceptance or refusal.

Sec. 1. When it May be Made.

In an action to recover damages for breach of a contract, the defendant's attorney may, with the answer, serve upon the plaintiff's attorney a written offer, that if the defendant fails in his defense, the damages may be assessed at a specified sum. (Co. Civ. Proc. § 736). The offer must be served with the answer. If made by the attorney, it must be subscribed by him, and he must annex to it an affidavit, that he is duly authorized to make it in behalf of the party. (Co. Civ. Proc. § 740).

Sec. 2. Effect of Acceptance or Refusal.

If the plaintiff serves notice, that he accepts the offer, with or before the notice of the trial, and damages are awarded to him on the trial, they must be assessed accordingly. (Co. Civ. Proc. § 736). If the plaintiff does not accept the offer, he cannot prove it upon the trial. But if the damages awarded to him, do not exceed the sum offered, the defendant is entitled to recover

the expenses necessarily incurred by him in preparing for the trial of the question of damages. The expenses must be ascertained, and the amount thereof determined, by the judge, or the referee, by or before whom the case is tried. (Co. Civ. Proc. § 737). The acceptance, if made by the attorney, must be subscribed and verified in the same manner as the offer. (Co. Civ. Proc. § 740).

ARTICLE IV.

OFFER TO COMPROMISE.

SECTION.

1. When made by defendant.
2. When made by plaintiff.
3. Acceptance.
4. Effect of refusal.

Sec. 1. When Made by Defendant.

The defendant may, before the trial, serve upon the plaintiff's attorney, a written offer, to allow judgment to be taken against him, for a sum, or property, or to the effect, therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken. (Co. Civ. Proc. § 738). A proper service of the offer and affidavit of authority is made by the delivery of copies thereof to the plaintiff's attorney; the original offer and affidavit need not be delivered. (*Smith v. Kerr*, 49 Hun, 29). An offer may be made in any action (*Bridenbecker v. Mason*, 16 How. Pr. 203; *Astor v. Pelache*, 49 How. Pr. 231; *Bathgate v. Haskin*, 63 N. Y. 261; *Singleton v. Home Ins. Co.*, 121 N. Y. 644); though it would seem to be of little value in matrimonial actions. (*Dailey v. Dailey*, 9 Misc. 511). The case of *Stevens v. Verianc* (2 Lans. 90), which holds to the contrary, is overruled. The offer may be made, although the effect of it may be to prefer one creditor over another. (*Beards v. Wheeler*, 11 Hun, 539; 76 N. Y. 213). If it appears, however, that it is made for the purpose of avoiding the provisions of the code as

to confession of judgment, the court may set aside a judgment upon the offer. (*Ross v. Bridge*, 15 Abb. Pr. 150; 24 How. Pr. 163). But it will do so only for actual fraud (*Beards v. Wheeler*, 11 Hun, 539), and unless it plainly appears that the judgment, so entered, is collusive or fraudulent, it cannot be set aside, where it is recovered in this manner. (*Trier v. Hermann*, 44 Hun, 489; affd. 115 N. Y. 163). The offer may be made before the service of the complaint (*Kilts v. Seeber*, 10 How. Pr. 270), or at any time before the trial of the action. But, as the plaintiff has ten days within which to accept the offer, if it is made within ten days before the case is reached for trial, it is substantially a nullity (*Herman v. Lyons*, 10 Hun, 111); and the plaintiff can, without paying any attention to the offer, move the case for trial, or take an inquest, or take any other proceeding in the case, as though no offer had been made (*Hawley v. Davis*, 5 Hun, 642); and he is entitled to costs, although he recovers a judgment less favorable than that offered. (*Sares v. Matthews*, 39 N. Y. St. Rep. 921; S. C., 15 N. Y. Supp. 510). Such an offer, being a nullity, the plaintiff's attorney is not bound to return it. (*Warner v. Babcock*, 9 App. Div. 398). When the offer is made by mail the plaintiff has twenty days in which to accept it. (*Van Allen v. Glass*, 60 Hun, 546). The offer may be for the full sum claimed in the complaint. (*Ross v. Bridge*, 15 Abb. Pr. 150; 24 How. Pr. 163). It must contain a consent that the judgment offered may be taken with costs, or it is a nullity. (*Ranney v. Russell*, 3 Duer, 689; *Loring v. Morrison*, 25 App. Div. 139). It is not necessary that the sum for which the offer is made shall be explicitly stated in terms, if by reference to the pleadings it can be readily ascertained. (*Burnett v. Wesifall*, 15 How. Pr. 420, 425). The offer must be absolute, and not upon any condition whatever. (*Pinckney v. Childs*, 7 Bosw. 660). It must be so distinct and plain, as to leave no doubt as to the meaning or extent of it. (*Bettis v. Goodwill*, 32 How. Pr. 137). If it is ambiguous, it is to be construed most strongly against the party making it. (*Id.*). In an action for foreclosure,

where the whole amount was not due, the offer was held to be insufficient, unless it offered that the amount due might be adjudicated. (*Id.*). In an action for dower, an offer to allow judgment that a specific number of acres might be set off, is too indefinite; the land offered should be described, so that judgment could be entered upon the offer. (*Marble v. Lewis*, 53 Barb. 432). A consent endorsed on the complaint, that judgment might be entered against the defendant for the amount claimed therein, is equivalent to an offer of judgment under this section. (*White v. Bogart*, 73 N. Y. 256). If there is more than one defendant, the offer may be made by any one, against whom a separate judgment could be taken. (Co. Civ. Proc. § 738). If the action is against joint debtors, the offer must be made by all, or on behalf of all. (*Griffiths v. DeForest*, 16 Abb. Pr. 292; 25 How. Pr. 336; *Heckemann v. Young*, 55 Hun, 406). One joint debtor, or partner, cannot make an offer for his co-partner, or joint debtor (*Garrison v. Garrison*, 67 How. Pr. 271; *Tripp v. Saunders*, 59 How. Pr. 379); unless there is evidence of his authority to do so. (*Binney v. LeGal*, 19 Barb. 592). Section nineteen hundred and thirty-two of the code does not apply to offers made under this section. Where the offer is made by one joint debtor, judgment entered upon it will be set aside upon motion. (*Everson v. Gehrman*, 1 Abb. Pr. 67; 10 How. Pr. 301). Where an action is against joint debtors, and one has made default, if the other answers, and makes an offer of judgment, the plaintiff may at once enter judgment against all the parties (*LaForge v. Chilson*, 3 Sand. 752); but if the defendants, who did not join in the offer, are not in default, so that judgment can be entered against them at the time of the acceptance, the plaintiff can not enter judgment against any of the defendants on the offer. (*Bridenbecker v. Mason*, 16 How. Pr. 203). If several defendants join in the offer, it should be signed by each one of them. The signature of the firm name by one partner does not authorize entry of judgment against the other partner, but only against the party actually signing the offer. (*Bridenbecker v. Mason*, *supra*). If the offer

is made by a party to an action, his signature need not be proved or acknowledged (*Pfister v. Stumm*, 7 Misc. 526); but if it is by his attorney in fact, his authority should be proved. (*Bridenbecker v. Mason*, *supra*). If an offer is made by the attorney for the party in the action, he must subscribe it, and annex thereto his affidavit, to the effect that he is duly authorized to make it in behalf of the party. (Co. Civ. Proc. § 740). An unverified offer by an attorney is a nullity, and no notice need be taken of it, not even to return it and the plaintiff may proceed in the action, as though the offer had not been served upon him. (*Riggs v. Waydell*, 78 N. Y. 586). If the action is against several defendants, for whom one attorney has appeared, and any of them have not authorized the attorney to make the offer, they will upon motion be allowed to defend; but the judgment entered upon the offer will be allowed to stand as security against them. (*Blodget v. Conklin*, 9 How. Pr. 442; *Sterne v. Bentley*, 3 How. Pr. 331). Making the offer operates substantially as a stipulation in the cause not to proceed further while it is pending, and the party making it, cannot during that time take any proceeding in the action prejudicial to the opposite party. (*Walker v. Johnson*, 8 How. Pr. 240). He may, however, notice the cause for trial, or do any formal act in the action; but he cannot take a default if it is reached for trial. Intermediate the offer and the expiration of the ten days allowed for its acceptance, he may serve an answer containing a counterclaim which stands and is to be considered in determining the relative amount of plaintiff's recovery, in case the offer is not accepted (*Kautz v. Vandenburg*, 77 Hun, 591; *Tompkins v. Ives*, 36 N. Y. 75); but the answer in such a case is only provisional, and is not to be considered if the plaintiff accepts the offer. (*U. S. Mortgage & Trust Co. v. Hodgson*, 30 Misc. 84). An offer may be amended by leave of the court, *nunc pro tunc* (*Citizen's Nat. Bk. v. Shaw*, 46 Hun, 589), even after the trial of the action. (*Eagan v. Moore*, 2 Civ. Pro. Rep. 300). But no amendment can be made without an order of the court (*Vellerman v. King*, 2 Edm.

Sel. Cas. 371); nor, without such permission, can the offer be withdrawn. (*McVickar v. Keating*, 19 App. Div. 581). Of course, a second offer of judgment for a different amount may be served. (*Hibbard v. Randolph*, 72 Hun, 626). The offer of judgment and acceptance, when served, constitute a contract between the parties which the court cannot set aside upon motion. (*Stilwell v. Stilwell*, 81 Hun, 392). The acceptance and entry of judgment upon a general offer concludes the plaintiff from bringing a new action for any part of the claim embraced in the complaint, and which might have been litigated in the former action (*Shepherd v. Moodhe*, 150 N. Y. 183). A counter-claim, contained in an answer served after the offer of judgment, is not extinguished, however, by the acceptance of the offer. (*Kautz v. Vandenburg*, *supra*). Where the defendant has made an offer of judgment and subsequently the plaintiff is allowed to amend his complaint in respect to the amount of interest claimed, the court should impose as a condition of such amendment that the defendant be allowed to increase his offer. (*Brooks v. Mortimer*, 10 App. Div. 518).

Sec. 2. When Made by Plaintiff.

Where the defendant sets up a counter-claim, to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, the plaintiff may serve upon the defendant's attorney, a written offer, to allow judgment to be taken against him for a specified sum, with costs, or against the defendant for a specified sum, and against the plaintiff for costs. (Co. Civ. Proc. § 739). When the offer is made by the plaintiff under this section, the rules with regard to it are the same as when it is made by the defendant, which have been stated in the previous section of this article.

Sec. 3. Acceptance.

If the plaintiff, within ten days after the defendant's offer, serves upon the defendant's attorney, a written notice that he accepts the offer, he may file the sum-

mons, complaint, and offer, with proof of the acceptance, and thereupon the clerk must enter judgment accordingly. (Co. Civ. Proc. § 738). If the defendant, within ten days after the plaintiff's offer, serves upon the plaintiff's attorney, notice that he accepts the offer, either party may file the summons, complaint, answer and offer, or copies thereof, and proof of acceptance; and thereupon the clerk must enter judgment accordingly. (Co. Civ. Proc. § 739). Judgment upon the acceptance may be entered without any application to the court. (*Hill v. Northrop*, 9 How. Pr. 525). If judgment had been entered without a formal acceptance, it is a mere irregularity, which may be disregarded, or it may be amended *nunc pro tunc*, by the court. (*White v. Bogart*, 73 N. Y. 256). The only way a party can avail himself of an offer of judgment is by the acceptance provided for in the code; it cannot be used on a motion for severance and judgment. (*N. Y. Wire Co. v. Westinghouse Co.*, 85 Hun, 269). Where an offer of judgment has been made and accepted, the court has power to grant an allowance in addition to costs in the action, if it is otherwise a proper case. (*Coates v. Goddard*, 34 N. Y. Super. Ct. Rep. 118; *Safety Steam Co. v. Dickson Mfg. Co.*, 61 Hun, 335).

Sec. 4. Effect of Refusal.

If notice of the acceptance of defendant's offer is not given within ten days, the offer cannot be given in evidence on the trial; but if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time. (Co. Civ. Proc. § 738).

If notice of the acceptance of plaintiff's offer is not given within ten days, the offer cannot be given in evidence upon the trial; but if the recovery is not more favorable to the defendant, than that so offered, he will not be entitled to recover costs from the time of the offer, but must pay costs from that time. (Co. Civ. Proc. § 739). If the offer is not accepted, it is not competent evidence in the case. (*Lintz v. Howard*, 18 Hun, 424). The plaintiff is entitled to costs to the time of

making the offer, whether the judgment is more favorable to him or not. (*Magnin v. Dinsmore*, 46 How. Pr. 297; 15 Abb. Pr. N. S. 331). The judgment is more favorable, whenever the amount of the recovery by the defendant, including the counter-claim extinguished, if one is pleaded, is greater than the amount of the offer. (*Turner v. Honsinger*, 31 How. Pr. 66; *Kautz v. Vandenburg*, 77 Hun, 591). In equity cases, the judgment which is finally entered in the case, and not the verdict of the jury on the issues, governs, in ascertaining whether or not the judgment is more favorable (*Wallace v. American Linen Thread Co.*, 16 Hun, 404); but it is to be remembered that in equity actions, in which the costs are in the discretion of the trial court, the court has power to direct that there shall be no costs, despite the fact that the plaintiff does not obtain so favorable a judgment as that offered. (*Conolly v. Hyams*, 42 App. Div. 63). Where the costs are prescribed by the code of civil procedure as a matter of right, the court has no such discretionary power, and the defendant becomes absolutely entitled to costs subsequent to the offer, if the plaintiff obtains a judgment less favorable than that offered. (*Rollins v. Barnes*, 23 App. Div. 240). Where the damages are liquidated, interest is to be calculated on the offer, from the time of making it to the time of entry of judgment, to ascertain whether or not the judgment is more favorable. (*Bathgate v. Haskin*, 63 N. Y. 261). But that rule does not apply, where the action is brought to recover unliquidated damages. (*Johnston v. Catlin*, 57 N. Y. 652). The rule laid down in that case was applied by the court of common pleas at special term, to a case where the damages were liquidated, and the court refused to permit interest to be computed upon the amount of the offer, to ascertain whether or not the judgment was more favorable to the plaintiff. (*Smith v. Bowers*, 3 Civ. Proc. Rep. 72). This was contrary to the holding of *Bathgate v. Haskin* (*supra*) and for that reason it is not correct. Whenever interest may be properly calculated on the offer, and the amount of the offer with interest exceeds the recovery, the judgment is not more

favorable to the plaintiff. (*Tilman v. Keane*, 1 Abb. Pr. N. S. 23). Where on the trial, the plaintiff recovered a judgment for more than the offer, which was reduced in the court of appeals to less than the offer, the defendants were entitled to costs subsequent to the offer, including the costs of the appeal, so far as the same were not discretionary. (*Sturgis v. Spofford*, 58 N. Y. 103; *Lumbard v. S. B. & N. Y. R. R. Co.*, 62 N. Y. 290). Where there is an unaccepted offer of judgment more favorable to the plaintiff than that recovered, it is within the power of the court to grant an additional allowance to the defendant. (*Landon v. Van Etten*, 57 Hun, 122).

CHAPTER XIX.

MISTAKES, OMISSIONS AND IRREGULARITIES.

ARTICLE I....Amendments.

ARTICLE II...Relief against omissions and mistakes.

ARTICLE III...Irregularities.

ARTICLE IV...Defects cured by verdict or judgment.

ARTICLE I.

AMENDMENTS.

SECTION.

1. What may be amended.
2. Application for amendment.
3. Mode of amendment.
4. Effect of amendment.

Sec. 1. What May be Amended.

Subdivision 1.—GENERAL PRINCIPLES.

The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defense, by conforming the pleading, or other proceeding to the facts proved. And, in every stage of the action, the court must disregard an error, or defect in the pleadings, or other proceedings, which does not affect the substantial rights of the adverse party. (Co. Civ. Proc. § 723). The statute does not limit the power of the court, but

it may still allow amendments on equitable grounds, in cases outside of the provisions of the code (*Weed v. Saratoga & Schenectady R. R. Co.*, 19 Wend. 534); the power to amend is inherent in the court as a part of its ordinary jurisdiction. (*Christal v. Kelly*, 88 N. Y. 285). A proceeding which is absolutely void cannot be amended. (*Harris v. Durkee*, 50 Super. 202; *Kendall v. Washburn*, 14 How. Pr. 380). If the proper proceeding is not taken to give the court jurisdiction, it has no authority to act in the case, and cannot make an order amending any proceeding which has been had. (*Hallett v. Righters*, 13 How. Pr. 43; *Kendall v. Washburn*, *supra*; *Ladenburg v. Com'l Bk.*, 87 Hun, 269; *affd.* without op., 146 N. Y. 406). If a process has been issued out of the wrong court, it cannot be amended by the court from which it was intended to issue. (*People v. Superior Court*, 18 Wend. 675; *Clarke v. Miller*, 18 Barb. 269). One court cannot amend the record of another court. (*Buchan v. Sumner*, 2 Barb. Ch. 165). Where a notice of appeal from one court to a superior court, is not sufficient to give the appellate court jurisdiction, it cannot be amended after the time to appeal has expired (*Wilmore v. Flack*, 96 N. Y. 512); nor can a notice of appeal be so amended as to include a judgment or order not appealed from, when the time to appeal from it has expired (*Lavalle v. Skelly*, 90 N. Y. 546); nor can an invalid appeal be rendered good by a *nunc pro tunc* order granting the requisite leave to appeal. (*Guarantee Trust, etc., Co. v. P. R. & N. E. R. R. Co.*, 160 N. Y. 1). Where a notice of appeal has been served instead of a notice of motion for a new trial, which the proper practice required, an amendment has been allowed so as to make the notice of appeal the notice of motion. (*Douglas v. Douglas*, 5 Hun, 140). The provisions of the code authorizing amendments are as broad and comprehensive as language can make them; and except as above stated, a court may amend any paper or proceeding in any action, in which it has acquired jurisdiction. (*Vaidero v. Vaidero*, 7 Hun, 313, 316). An amendment is not a matter of right, nor of course, but is purely a matter of favor (*Hatfield v.*

Secor, 1 Hilt. 535); and whenever an application for an amendment has been made, some excuse, however slight, must be shown for the mistake; and if none is shown, the court will usually deny the motion. (*Har-rington v. Slade*, 22 Barb. 161; *Bewley v. Equitable L. Ins. Co.*, 10 Wk. Dig. 191). The discretion of courts granting leave to amend will not be reversed on appeal, save for an abuse thereof. (*Barton v. Barton*, 24 Wk. Dig. 219). Unnecessary and inexcusable delay in making the application, is ground for refusing an amendment (*Gowdy v. Poullain*, 2 Hun, 218; *Sheldon v. Adams*, 41 Barb. 54; *Jones v. Newton*, 47 N. Y. St. Rep. 217); but this rule is not so strictly applied to public corporations. (*Lunney v. Mayor, etc.*, 14 Wk. Dig. 140; *Stemmler v. The Mayor, etc.*, 45 App. Div. 573). The court will not permit a party to suffer by its own mistakes or delays (*Clapp v. Graves*, 2 Hilt. 317); nor by those of its officers. (*Mechanics' Bank v. Minthorne*, 19 Johns. 244). Attorneys are officers within this rule (*Neele v. Berryhill*, 4 How. Pr. 16); but besides being an officer of the court, an attorney is also the agent of his client; and relief will not be given to his client against the mistakes of the attorney, to the prejudice of third persons, who have acquired rights in good faith. (*Bank of Rochester v. Emerson*, 10 Paige, 359). A mere technical mistake, however, is not one which a third person can take advantage of, if there is no doubt as to what was intended; and such mistake may be amended although he has relied upon it. (*Close v. Gillespey*, 3 Johns. 526). The statute makes no distinction with regard to the right of amendment, between the different kinds of actions or defenses, whether they are such as were formerly called unconscionable or not. (*Catlin v. Gunter*, 11 N. Y. 368; *Union Nat. Bk. of Troy v. Bassett*, 3 Abb. Pr. N. S. 359). The court has no right to discriminate between actions and defenses not favored by law and other actions, except perhaps to hold the party, replying upon such causes of action or defenses, to somewhat stricter practice. (*Gilchrist v. Gilchrist*, 44 How. Pr. 317; *Barnett v. Meyer*, 10 Hun, 109). In the case of *Gasper v. Adams* (24 Barb. 287), it was

held that in actions of that nature, the court would only grant such amendments as it was required to do by statute. This case, however, although it was rightly decided, because of the rule that the court would not allow an amendment, which would have the effect of reversing a judgment, is not authority for any discrimination as to amendments, on account of the nature of the cause of action or defense. (*Bank of Kinderhook v. Gifford*, 40 Barb. 659; *Barnett v. Meyer*, 10 Hun, 109). An amendment which is not necessary, or which would not secure or affect the rights of the party asking for it, will not be permitted. (*Ten Eick v. Simpson*, 11 Paige, 177; *Tharp v. Heyman*, 16 Misc. 491; S. C., 38 N. Y. Supp. 742). Where a motion has been made to set aside a proceeding for a technical defect or irregularity, a party will be allowed to amend the defect, or to cure the irregularity complained of, without a new motion, where the amendment is proper, and no new facts are shown which ought to defeat it (*Wolford v. Oakley*, 1 Sheld. 261; S. C., 43 How. Pr. 118); but it is in the discretion of the court, whether it will do so or not; and such an amendment will be refused where it would work injustice, or would not be in furtherance of justice. (*South Isl. N. & I. Co. v. Sherwin*, 1 Civ. Proc. Rep. 44).

Subdivision 2.—AMENDMENT OF SUMMONS.

The summons may be amended by inserting the name of the county (*Wallace v. Dimmick*, 24 Hun, 635); or of the court, where it appears in the complaint, which has been served (*Walker v. Hubbard*, 4 How. Pr. 154); but not where the name of the court has been omitted in both summons and complaint. (*Ward v. Stringham*, 1 Co. Rep. 118). Where the summons contains an error as to the time in which the defendant must appear, this may be corrected by amendment. (*Gribbon v. Freel*, 93 N. Y. 93). The summons may also be amended by adding new parties or striking them out (*Lewin v. Wright*, 31 Hun, 327); or by changing the character in which a party is sued, as by changing an action from

one against defendant in a representative capacity, to one against him personally (*Tighe v. Pope*, 16 Hun, 180); or by correcting a defect in the name of the defendant (*Weil v. Martin*, 24 Hun, 645; *Stuyvesant v. Weil*, 167 N. Y. 421); or, where suit is brought against A. & Son as partners, by striking out the words "& Son" and inserting his name. (*Bannerman v. Quackenbush*, 11 Daly, 529). On an application to amend by inserting the true names of the defendants, which have been discovered, in place of fictitious names, which have been used under section four hundred and fifty-one of the code, several real names may be substituted for a single fictitious name. (*Betts v. Betts*, 4 Abb. N. C. 317, 323, note). The summons may also be amended by striking out the name of a receiver, and inserting the name of the corporation of which he is receiver. (*Abbott v. Jewett*, 25 Hun, 603). An amendment may be made, by substituting the name of the attorney, for that of an agent who had signed the summons (*Weir v. Slocum*, 3 How. Pr. 397); or by substituting the name of one of a firm of attorneys, to the signature of the summons, in place of the name of the firm (*Shuyter v. Smith*, 2 Bosw. 673); or by adding the omitted office, or postoffice, address, or street number of the plaintiff's attorney (*Wiggins v. Richmond*, 58 How. Pr. 376); or by substituting a written, for a printed subscription (*Farmers' Loan and T. Co. v. Dickson*, 17 How. Pr. 477); although a printed subscription to the summons is good. (*Barnard v. Heydrick*, 49 Barb. 62). But the court cannot authorize the amendment of the summons, by striking out the name of a sole plaintiff or defendant, and inserting the name of another person in his place (*N. Y. State Milk Pan Assn. v. Remington Agr. Works*, 89 N. Y. 22); but the doctrine of the last cited case has been limited to cases where a different person is sought to be brought in by amendment; thus, where the defendant was sued as a domestic corporation, when in fact it was an unincorporated association, the court upon the plaintiff's motion amended the summons and complaint by making the action against the president pursuant to

section 1919 of the code of civil procedure. (*Munzinger v. The Courier Co.*, 82 Hun, 575). An amendment of the summons can only be made by leave of the court. (*McCrane v. Moulton*, 3 Sand. 736). The motion must be for leave to amend the summons; and the amendment cannot be made on a motion for judgment (*Diblee v. Mason*, 1 Co. Rep. 37); but in a proper case, if the notice of motion contains a prayer for general relief, the summons may be amended. (*Walkinshaw v. Perzel*, 7 Robt. 606).

Subdivision 3.—PROCESSES OTHER THAN SUMMONS.

The following processes have been held amendable, and have been amended by the court, in proper cases: A writ tested on Sunday (*Williams v. Hogeboom*, 22 Wend. 648); or returnable on that day (*Boyd v. Vanderkemp*, 1 Barb. Ch. 273); or otherwise wrongly tested as to time (*Parke v. Heath*, 15 Wend. 301), or place (*Raymond v. Hinman*, 4 Cow. 41); or where the testatum clause is altogether omitted (*M'Intire v. Rowan*, 3 Johns. 144); or which omits the title of the judge of the court (*People v. Albany Mayor's Court*, 9 Wend. 486), or the name of the judge of the court (*Douglas v. Haberstro*, 88 N. Y. 611); or which states no place of return (*Cutler v. Rathbone*, 1 Hill, 204), or the wrong place (*McKonev v. Glen*, 1 Cow. 141; *People ex rel N. Y. C. & H. R. R. R. Co. v. Cook*, 62 Hun, 303; *People ex rel Hasbrouck v. Bd. of Supervisors*, 135 N. Y. 522); or which gives no direction as to the return (*Douglas v. Haberstro*, 88 N. Y. 611); or which is made returnable "before us" instead of "before our justices" (*Williams v. Rogers*, 5 Johns. 163); or an attachment for contempt, returnable before one of the judges of the court at chambers, instead of before the judge who granted it. (*Kelly v. McCormick*, 28 N. Y. 318). The omission of a clerk's signature to a writ, may be amended (*Peppoon v. Jenkins*, 3 Johns. Cas., 2 Ed., 420); or the proper seal of the court affixed by amendment. (*People ex rel Strait v. Steuben Com. Pl.*, 5 Wend. 103). The return to a writ may be amended. (*People ex rel Grogan v. York*, 51

App. Div. 502). The signature of an attorney, to a warrant of attachment which has been omitted, may be supplied. (*Kissam v. Marshall*, 10 Abb. Pr. 424). An execution, tested by mistake after the plaintiff's death, may be amended. (*Center v. Billinghamurst*, 1 Cow. 33). An execution may also be amended, by striking out the names of parties against whom it should not have issued (*Van Deusen v. Brower*, 6 Cow. 50); by making it an execution against personal property only (*Stevens v. Browning*, 2 Co. Rep. 123); or by making it an execution against both, where real property has been omitted (*Lansing v. Lansing*, 18 Johns. 502); or by correcting the amount, when the execution has been issued for too much, although after an action for false imprisonment has been brought, because of the arrest upon it (*Holmes v. Williams*, 3 Caines, 98); or by correcting the recitals in an execution against the person, as to the issue of an execution against property (*Walker v. Isaacs*, 36 Hun, 233; *Eads v. Wynne*, 79 Hun, 463); or by correcting the amount for which the execution was issued by including interest (*Kokomo Strawboard Co. v. Inman*, 21 N. Y. Supp. 705); or by inserting a proper direction as to the return of the execution. (*Benedict, etc., Mfg. Co. v. Thayer*, 20 Hun, 547). Where an execution has been issued and levied on property, in a county in which the judgment had not been docketed, it was held that the court would amend by directing judgment to be docketed in that county, *nunc pro tunc* (*Roth v. Schloss*, 6 Barb. 308); but where an execution is issued out of the wrong court, it is void, and it is not amendable. (*Clarke v. Miller*, 18 Barb. 269).

Subdivision 4.—JUDGMENTS AND JUDGMENT ROLLS.

The question has been much discussed, whether the court has power to amend an offer of judgment, which is defective, because it has been made by an attorney, who has not annexed to it an affidavit of his authority to make it. In *Riggs v. Waydell* (17 Hun, 515), the court say that such an offer is a nullity, and that the court has no power to direct its amendment. This case

was affirmed by the court of appeals (*Riggs v. Waydell*, 78 N. Y. 586); but in affirming it, the court of appeals regard the question as unsettled, and say that the case was properly decided without reference to that point. In *Eagan v. Moore* (2 Civ. Proc. Rep. 300), it was held, by the special term of the common pleas, that the court had power to amend such an offer of judgment, *nunc pro tunc*, by allowing the affidavit of the attorney's authority to be annexed. And in the case of *Starks v. Starks* (2 How. Pr. N. S. 360), the special term of the supreme court also held that it had the power to authorize such an amendment. In each of these cases, *Riggs v. Waydell* was distinguished for the reason that it was not necessary to decide the question of power. The reasoning and result of the case of *Eagan v. Moore* has been approved by the appellate division in the second department. (*McVickar v. Keating*, 19 App. Div. 581, 583). In the case of *Citizen's Nat. Bk. v. Shaw* (46 Hun, 589), it was held by the general term of the fifth department, Mr. Justice Bradley writing a very comprehensive opinion on the subject, that such amendment is within the power of the court; these decisions and opinions seem to settle any doubt as to the existence of such power. A statement, on which confession of judgment is based, may be amended, and the court may give it priority of lien over subsequent judgment creditors; but whether or not it will do so, is entirely in its discretion; or it may impose as a condition of allowing the amendment, that the plaintiff consent to a postponement of the lien of his judgment, but it cannot, on granting the motion to amend, absolutely postpone the lien of the judgment. (*Symson v. Silheimer*, 40 Hun, 116; 105 N. Y. 620, 660). The court may also, in a proper case, compel the judgment debtor to make an additional statement to conform to the facts, which may be annexed to the confession. A defective affidavit of no answer, may be amended *nunc pro tunc*, after the judgment, by adding the signature to the jurat (*Fawcett v. Vary*, 59 N. Y. 597), or by adding the affidavit itself. (*Tradesman's Natl. Bank v. McFeely*, 3 Hun, 699; *affd.* 66 N.

Y. 617). Proof of service may be amended, where the service had been regularly made, but the proof was insufficient (*Herbert v. Smith*, 6 Lans. 493; *White v. Bogart*, 73 N. Y. 256); but where there was no service in fact, the defect is jurisdictional and irremediable. (*Bellamy v. Guhl*, 62 How. Pr. 460); so there is no power to allow an amendment, by filing proof of the genuineness of the signature to an admission of service of the summons, on the application of an attorney who has no authority to appear for the plaintiff. (*Lapaugh v. Wilson*, 6 N. Y. St. Rep. 624). A judgment cannot be amended in a material matter as to the merits on motion, after the decision of the judge (*McLean v. Stewart*, 14 Hun, 472; *Rockwell v. Carpenter*, 25 Hun, 529; *Best v. Palmer*, 22 Wk. Dig. 482; *Heath v. N. Y. B. L. B. Co.*, 146 N. Y. 260). Where the error is the result of an incorrect finding on the part of the court, either as a question of fact upon the evidence or an erroneous conclusion from the facts, which was intended to be made, the error can be corrected only upon appeal (*Morrison v. Met. El. R. Co.*, 60 App. Div. 180); but where the amendment is sought simply to make the judgment conform to the decision actually rendered, but which, when formulated, failed, through mistake or inadvertence, to express the intention of the court, the court is authorized at any stage of the proceedings to order it. (*Beitz v. Fuller*, 92 Hun, 457). A court has no power to have an entirely new order, or ruling entered *nunc pro tunc*, thus bringing into the record an element which did not previously exist; the facts must exist, and then if the record of them is imperfect or incomplete, it may be amended, but if the record shows the actual facts no order can be properly made changing them so as to take the place of an act that was required to be previously performed. (*Guarantee Trust Co. v. P. R. & N. E. R. R. Co.*, 160 N. Y. 1). But the court may order an amendment, by correcting a mistake in the title (*Tasker v. Wallace*, 6 Daly, 364); or by correcting the description of lands in a judgment of foreclosure (*Wood v. Martin*, 66 Barb. 241), or in the ordinary suit for an injunction and damages against an elevated railway (*Morrison v. Met. El.*

R. Co., supra) ; and where an action was brought against three partners, and two only were served, and judgment was entered by mistake against those two alone, it can allow an amendment of the judgment, so that it will be against all three. (*Produce Bank of N. Y. v. Morton*, 67 N. Y. 199). In the last case, the judgment was permitted to be amended *nunc pro tunc*, in the respect mentioned, after a creditor's suit had been brought on it. A judgment of foreclosure may be corrected before sale, by striking out a direction that the referee pay certain liens, and inserting a direction that he sell subject to those liens (*Valentine v. McCue*, 26 Hun, 456) ; or by adding a direction that the premises be sold subject to a life estate (*Brown v. Beckmann*, 53 App. Div. 257). Where an action was brought by a receiver, and the complaint was dismissed, the court at the same term may amend the judgment, by directing that the costs be paid by the receiver out of the estate. (*Henry v. Randall*, 15 Wk. Dig. 106). Where a defendant was designated by a fictitious name in the summons, the court of common pleas was held to have power to amend all proceedings before and after judgment, by inserting the correct name when it is ascertained, although the judgment was a judgment of that court, only by virtue of filing a transcript from a district court. (*Hilton v. Sinshcimer*, 5 Civ. Proc. Rep. 355). A clerical mistake in the name of a judgment creditor may be amended (*Marsh v. Berry*, 7 Cow. 344) ; a misdescription of the representative capacity in which the defendant is sued, may be corrected by amendment (*McElwain v. Corning*, 12 Abb. Pr. 16) ; but a judgment should not be amended *nunc pro tunc*, by changing the name of the debtor, without notice to him. (*Nagle v. Junker*, 17 Wk. Dig. 438). A judgment, dismissing the complaint without prejudice to a new action, may be amended on motion, before the time to appeal has expired, by giving leave to serve a new complaint in that action. (*N. Y. Ice Co. v. N. W. Ins. Co.*, 23 N. Y. 357). Even after satisfaction of a judgment, it is within the power of the court to vacate it, and to amend the complaint by adding new causes of action, although by so doing the statute of limitations is

avoided. (*Hatch v. Central Nat. Bk.* 78 N. Y. 487). A judgment, entered by mistake for less than the amount of the verdict, may be amended by the court. (*Price v. Evers*, Col. & C. Cas. 46). As to clerical errors or omissions, which would have been inserted at the hearing, as of course, the judgment may always be amended. (*Clark v. Hall*, 7 Paige, 382). After appeal to the court of appeals, the judgment may be amended by the supreme court, so as to state that the reversal was upon facts, as well as upon the law. (*Natl. City Bank v. N. Y. Gold Exch. Bank*, 97 N. Y. 645); or that the reversal was upon a question of fact only (*Health Dept. v. Dassori*, 159 N. Y. 245), or upon questions of law only. (*Judson v. Central Vt. R. R. Co.*, 158 N. Y. 597). It is doubtful whether the court below has power to authorize an amendment of the judgment or the record, in what may be a material particular, after the final disposition or determination of the case by the appellate court (*Meldon v. Devlin*, 39 App. Div. 581); but if such power exists, it will not be exercised except in an extraordinary case. (*Drake v. N. Y. Iron Mine*, 38 App. Div. 71). The court of appeals cannot amend the record of the supreme court, by inserting an exception which does not appear in the case; if the amendment is desired, it must be sought in the supreme court (*Kenyon v. N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 607). It has been intimated in a comparatively recent case that the application should be made to the judge who tried the case (*Ropes v. Arnold*, 66 N. Y. St. Rep. 306); but in *Petit v. Petit* (20 Wk. Dig. 154), it was distinctly held that the application should be made to the special term. A judge who has tried a case, and made and filed his decision, cannot alter it (*Hoyt v. Carter*, 7 How. Pr. 140); but if he has inadvertently made erroneous findings of law, he may, before the time to appeal has expired, by an order on notice, vacate the judgment and re-settle the findings. (*Coffin v. Lester*, 36 Hun, 347; *affd.* without op., 110 N. Y. 645). The decision in the case last cited, was put upon the ground that the errors which were corrected, had clearly been made inadvertently by the judge; and the case of *McLean v. Stewart* (14 Hun, 472) was dis-

tinguished, for the reason, that in that case, there was no mistake or omission in the findings. An appellate court may amend their judgment on appeal, by inserting a direction for a new trial, instead of judgment absolute for the appellant (*Meyer v. City of Louisville*, 7 Abb. Pr. 6); or by striking out a direction for costs, which has been inserted by mistake (*Murray v. Blatchford*, 2 Wend. 221); or by amending a mistake in the order, so as to make it conform to the decision (*Altman v. Hofeller*, 137 N. Y. 619), although the remittitur has been filed in the court below. (*Palmer v. Lawrence*, 5 N. Y. 455). Where, after a verdict for the plaintiff, exceptions were ordered to be heard at the general term, and judgment suspended, and the defendant died after the argument in the general term, and before the decision, the general term cannot order judgment to be entered as of the date of the verdict. (*Tuomy v. Dunn*, 77 N. Y. 515).

Subdivision 5.—AMENDMENT OF MISCELLANEOUS PROCEEDINGS.

Acknowledgments. Where a guardian *ad litem* has omitted to annex an acknowledgment of his consent to act, it may be supplied *nunc pro tunc*, after judgment. (*Tobin v. Cary*, 34 Hun, 431).

Affidavits. The want of title, or a defect in the title, of an affidavit, does not impair it, if it intelligibly refers to the action or special proceeding, in which it is made. (Co. Civ. Proc. § 728). An affidavit may be amended as to a clerical error (*Murphy v. Hall*, 38 Hun, 528; *Babcock v. Kuntzsch*, 85 Hun, 33; *Yellow Pine Co. v. Atlantic Lumber Co.*, 21 Misc. 164; *affd.* without op., 22 App. Div. 629); or by permitting it to be sworn to anew, when the jurat has been omitted by mistake (*Hees v. Snell*, 8 How. Pr. 185, note); or by procuring the certificate of the secretary of state, which had been accidentally left off. (*Lawton v. Kiel*, 51 Barb. 30; see, however, *Cream City Furniture Co. v. Squier*, 2 Misc. 438). In the case of *Clickman v. Clickman* (1 N. Y. 611), it was suggested that an affidavit could not be

amended; but that case was seriously questioned by *Bowman v. Sheldon* (5 Sand. 657), in which it was said that Judge Bronson's statement in that regard was not the opinion of the court, but his mere individual idea; and the case has not been followed. In *Harris v. Dürkee* (50 Super. 202), where the jurat of an affidavit to procure an order of arrest was not in proper form, it was held that the defect was jurisdictional, and could not be amended.

Attachment. Upon a motion to vacate a warrant of attachment, it may be amended by inserting new grounds for issuing the writ, which are warranted by the affidavits. (*Kibbe v. Wetmore*, 31 Hun, 424); or by inserting the grounds in a warrant which contained no statement at all in that respect (*King v. King*, 59 App. Div. 128); or by reducing the amount. (*Sulzbacher v. Cowthra*, 14 Misc. 545; *affd. on op. below*, 148 N. Y. 755). The omission of an attorney to sign the warrant may be amended *nunc pro tunc*. (*Genin v. Tompkins*, 12 Barb. 265).

Bonds and Undertakings. A bond or undertaking, required by statute to be given by a person, to entitle him to a right or privilege, or to take a proceeding, is sufficient, if it conforms substantially to the form therefor, prescribed by the statute, and does not vary therefrom, to the prejudice of the rights of the party, to whom, or for whose benefit it is given. (Co. Civ. Proc. § 729). Where such a bond or undertaking is defective, the court, officer, or body, that would be authorized to receive it, or to entertain a proceeding in consequence thereof, if it was perfect, may, on the application of the persons who executed it, amend it accordingly; and it shall thereupon be valid, from the time of its execution. (Co. Civ. Proc. § 730). Leave may be given to amend an undertaking, even in case of a substantial departure from the statute. (*Irwin v. Judd*, 20 Hun, 562). But not where the bond is insufficient to give the court jurisdiction; in that case the court has no power to order an amendment. (*Ex Parte Chrysler*, 4 Cow. 80; *Van Slyke v. Schmeck*, 10 Paige, 301; *Spotts v. Dumesnil*, 12 Abb. Pr., N. S. 128). An undertaking should not be amended

without the consent of the sureties and the obligor (*Langley v. Warner*, 1 N. Y. 606; *Shaw v. Lawrence*, 14 How. Pr. 94); such consent should be in writing, and filed with the bond. (*Potter v. Baker*, 4 Paige, 290). It may be amended on motion of the surety (*O'Sullivan v. Connors*, 22 Hun, 137); but it is not error to refuse to amend, although the surety joins in the offer and consents to it. (*Ramsey v. Childs*, 34 Hun, 329). If the requirements of the bond are prescribed by a rule of the court, and not by a statute, the court may dispense with the strict letter of the rule, and allow a new bond to be substituted for the insufficient one. (*Eldridge v. Howell*, 4 Paige, 457). The court may allow a bond to be amended by adding another surety. (*Potter v. Baker*, 4 Paige, 290; *Shaw v. Lawrence*, 14 How. Pr. 94). The application to amend should be upon affidavit, joined in, or consented to by the obligors, and should specify the proposed amendment, and contain an express consent to it on the part of the signers of the bond, and an agreement to execute and acknowledge a new bond when the amendment is ordered. (*Shaw v. Lawrence*, 14 How. Pr. 94). The court may permit a new bond to be filed in replevin, giving the defendant the usual time to except to the sureties. (*Cutler v. Rathbone*, 1 Hill, 204; *Newland v. Willett*, 1 Barb. 20; *Dale v. Gilbert*, 128 N. Y. 625). Where a replevin bond was defective by reason of the mistake of the sheriff, and the plaintiff had filed a new one without leave of the court, the court allowed the proceedings to stand. (*Hawley v. Bates*, 19 Wend. 632). A court may order a bond filed *nunc pro tunc* whenever it has acquired jurisdiction of the case; as in the case of a guardian *ad litem* of an infant defendant in partition (*Croghan v. Livingston*, 17 N. Y. 218); or to stay proceedings on an appeal from a judgment (*Smith v. Heermance*, 18 How. Pr. 261); or to perfect an appeal where the bond filed was insufficient for that purpose. (*Mills v. Thursby*, 11 How. Pr. 129; *Robinson v. Moran*, 23 Wk. Dig. 326). It may permit the affidavits of sureties to be filed *nunc pro tunc* (*Rich v. Beekman*, 2 Co. Rep. 63); or the justification to be amended (*People ex rel Boylston v. Tarbell*,

17 How. Pr. 120); or where the seals upon a receiver's bond were omitted, it was held that the court might amend it. (*Hyatt v. Dusenbury*, 12 Civ. Proc. Rep. 152). Where an action was begun without filing an undertaking which was a condition precedent to bringing the suit, the court allowed it to be done *nunc pro tunc*. (*Millbank v. Broadway Bank*, 3 Abb. Pr. N. S. 223). On motion to vacate an injunction for insufficiency of the undertaking, a proper undertaking was permitted to be filed (*Leffingwell v. Chave*, 5 Bosw. 703); and where a judge's approval was not indorsed upon the copy served, the court permitted it to be added. (*Augrich v. McOwen*, 4 Law Bull. 66). Where a motion was made to vacate an attachment because the undertaking was insufficient, the court permitted a new undertaking to be served. (*Kissam v. Marshall*, 10 Abb. Pr. 424); and the same thing was done on a motion to vacate an order of arrest. (*Bellinger v. Gardiner*, 2 Abb. Pr. 441; 12 How. Pr. 381).

Cases. It is doubtful if the court has power to authorize an amendment of the case after the final determination of the case by the appellate court (*Drake v. N. Y. Iron Mine*, 38 App. Div. 71; *Meldon v. Derlin*, 39 App. Div. 581); if it does exist it will not be exercised except in an extraordinary case. (*Drake v. N. Y. Iron Mine*, *supra*). The judge before whom an action is tried, may amend the case so as to agree with his minutes on a motion for a new trial made before him; although no application has been made to amend by either party. (*Toplitz v. Raymond*, 10 Abb. Pr. 60). An application to amend a case, must ordinarily be made to the special term. (*Talcott v. Rosenberg*, 3 Daly, 203, 213; *Graham v. People*, 63 Barb. 468, 474; see, however, *Ropes v. Arnold*, 66 N. Y. St. Rep. 306). The usual practice in such cases, is to apply to the special term before argument, to correct the case. But if the argument has been had at the appellate division, the proper practice is to apply to the appellate division to send it back, to enable an application to be made in the special term. If an appeal has been taken, and a case made and filed, the justice before whom the action was

tried has no power to amend it. (*Pettit v. Pettit*, 20 Wk. Dig. 154).

Commissions. A commission to take testimony is a process, and amendable like any other process. (*Leetch v. Atlantic Mut. Ins. Co.*, 4 Daly, 518). Where a commission wrongly stated the names of the witnesses, but the intended witnesses were examined, and the commission returned with the true names, leave was granted to send it back to have the witnesses re-examined, without issuing a new commission. (*Keceler v. Vanderpool*, 1 Co. Rep. N. S. 289).

Notices of appeal. Defects or mistakes in a notice of appeal may be amended, as an error in the title of the action (*McLachlin v. Brett*, 27 Hun, 18); or a failure to subscribe it. (*Gutbrecht v. Prospect Park & C. I. R. Co.*, 28 Hun, 497). Any act which constitutes a step in the proceedings to appeal, may be amended, unless the defect in it is so gross that the court is not satisfied that the paper relied on was intended for an appeal in the action in question. (*Id.*; *Sherman v. Wells*, 14 How. Pr. 522). A notice of appeal cannot be amended, from which a jurisdictional requirement has been intentionally omitted (*Wilmore v. Flack*, 96 N. Y. 512); or so as to include in it a judgment or order, the time to appeal from which has expired. (*Patterson v. McCunn*, 38 Hun, 531).

Orders. Orders may be amended by striking out a caption, erroneously inserted in a judge's order (*Mojarieta v. Sachs*, 80 N. Y. 553); or by inserting leave to renew (*Hopkins v. Flynn*, 7 Cow. 526); or where costs had been given, by inserting the amount (*Tillspaugh v. Dick*, 8 How. Pr. 33); or by permitting the entry of the order *nunc pro tunc* (*Gurney v. Sharp*, 17 Abb. Pr. 410; *affd.*, 41 N. Y. 619; *Barnard v. Heydrick*, 49 Barb. 62); or by changing an order of reference to take testimony, into an order of reference to hear and determine, where the first order had been erroneously entered (*Bliss v. Bliss*, 13 Daly, 489); or by modifying an injunction order, so as to better protect the rights of the plaintiff. (*Williams v. Johnson*, 2 Bosw. 1). All amendments of orders are, however, subject to the qualifica-

tions heretofore noted in dealing with the subject of amendments to judgments and judgment rolls, i. e., while an order may be amended to conform to a decision, it cannot be amended so as to make the court rule upon a question that was never presented to it, or rule differently than it actually did. (*Wingrove v. German Sav. Bk.*, 2 App. Div. 479). Orders may be amended after an appeal therefrom has been taken. (*Dinkelspiel v. Levy*, 12 Hun, 130).

Petitions. Formal omissions in the body of a petition, or the omission of a verification may be supplied even after judgment. (*Rogers v. McLean*, 11 Abb. Pr. 444; *affd.*, 34 N. Y. 536; *Van Wyck v. Hardy*, 11 Abb. Pr. 473; 20 How. Pr. 222; *affd.*, 39 How. Pr. 392).

Remittitur. The court of appeals has power to, and in a proper case will, require the supreme court to return the remittitur for the purpose of amendment, even though it has been filed and an order entered thereon by the supreme court. (*Franklin Bank Note Co. v. Mackay*, 158 N. Y. 683). The practice in the supreme court upon such a request by the court of appeals is to vacate the order and judgment (if any) entered on the remittitur and return it in accordance with the request.

Returns. The court to which a return is made by a sheriff or other officer, or by a subordinate court, or other tribunal, may, in its discretion, direct the return to be amended, in matter of form, either before or after judgment. (Co. Civ. Proc. § 725). A sheriff's return to an execution may be amended, by striking out the return of *nulla bona* (*Burham v. Brennan*, 42 N. Y. Super. Ct. Rep. 49; reversed on another point, 74 N. Y. 597); although after an action has been brought against him for a false return. (*People v. Ames*, 35 N. Y. 482). An appellate court will not, however, amend a return so as to make it different from the record. (*Shultz v. Hoagland*, 11 Wk. Dig. 294).

Sheriff's certificates and deeds. A sheriff's certificate of sale may be amended by inserting a parcel of land accidentally omitted (*Smith v. Hudson*, 1 Cow. 430); or by striking out a parcel improperly included. (*Richards v. Varnum*, 8 How. Pr. 79). An incorrect reference

to the execution in the deed may be amended. (*Gansevoort v. Gilliland*, 1 Cow. 218). A variance between the recitals in his deed on execution, and the judgment and execution may be corrected on motion. (*Matthews v. Cook*, 13 Wend. 33).

Verdicts. The power to amend verdicts, is limited to formal defects; and those can only be amended by the court in which the trial was had. (*Cooper v. Bissell*, 15 Johns. 318). The court has no power to amend the verdict, if there is the slightest doubt as to the facts in the case (*Burhans v. Tibbitts*, 7 How. Pr. 21); but where there is no doubt about the facts, the court may direct an amendment making the verdict conform to such facts. (*Hodgkin v. Mead*, 119 N. Y. 166). So where the jury were charged to bring in a verdict for a certain amount if they found for the plaintiff, and their sealed verdict was only "for the plaintiff" with no amount, the court had the power to insert that amount by amendment, the jury having dispersed. (*Id.*). Likewise the court has power to change the answer "not proven" of a jury, to a certain question submitted to them, to "no." (*Cruikshank v. Cruikshank*, 38 App. Div. 580). Where a judge ordered a verdict for the defendant on one issue, and sent another issue to the jury, who found only a general verdict for the plaintiff; the court may order an amendment of the verdict by stating that it was for the defendant on the first count, and for the plaintiff on the second count. (*Burhans v. Tibbitts*, *supra*). So where one count was good and the other was bad, a general verdict may be amended by applying it to the good count, if the judge certifies that all the evidence applied, or might properly apply to that count, and both counts were for the same cause of action. (*Allen v. Addington*, 12 Wend. 215). In an action of replevin, where the jury found for the plaintiff, but awarded no damages for the detention of the goods, the court may supply the omission by inserting nominal damages. (*Von Schoening v. Buchanan*, 14 Abb. Pr. 185, 468). If the foreman of a jury, by mistake, announces a verdict different from that agreed upon, and the wrong verdict has been recorded, the court at the same term has power

to correct it by making it conform to the verdict actually found. (*Dalrymple v. Williams*, 63 N. Y. 361). Where a sealed verdict has been received, it cannot be amended by the court, in matter of substance; but the jury, if they have not separated, may retire and reconsider it. (*Hersberg v. Murray*, 40 Super. 271).

Sec. 2. Application for Amendment.

An application to amend must be made on notice to the opposite party if he has appeared (*Kneeland v. Martin*, 2 Law Bull. 56); and the application must be made to the court. (Co. Civ. Proc. § 727). The affidavits must show an excuse for the defect. (*Bewley v. Equitable L. Ins. Co.*, 10 Wk. Dig. 191). If an amendment of the pleadings is sought, a copy of the proposed amendment must be submitted with the motion papers. (*Allen v. Fowler & Wells Co.*, 45 App. Div. 506; *Stern v. Knapp*, 52 N. Y. Super. Ct. Rep. 14). The desired amendment should always be clearly stated, and if the amendment is allowed, it should be explicitly recited in the order. Persons entitled to notice, may appear and oppose the amendment, but no other person; bail have no right to object to amendments of proceedings in the action, although it may affect their rights. (*Coster v. Phoenix*, 7 Cow. 524).

A process, pleading, or record, shall not be altered by the clerk, or any other officer of the court, or by any other person, without the direction of the court, or of another court of competent authority; except in a case where a party or his attorney is specially authorized by law to amend a pleading. (Co. Civ. Proc. § 727). On granting the amendments, the court can only impose such terms as are just, and will fairly indemnify the adverse party for all expenses to which he will be put by reason of it. (*Hand v. Burrows*, 15 Hun, 481). If he is not prejudiced by the amendment, no terms will be imposed (*Cayuga Co. Bank v. Warden*, 6 N. Y. 19), except costs of the motion.

Sec. 3. Mode of Amendment.

An immaterial error need not be amended, but the court may direct that it be disregarded. (*Cheetham v.*

Tillotson, 4 Johns. 499). Clerical errors may be amended by interlineation. (*Ayres v. Valentine*, 2 Edw. Ch. 451; *DeCaters v. DeChaumont*, 3 Paige, 178). Amending a judgment record by obliteration or erasure, even when it leaves the passage legible, is improper. It should be done by appending the order of amendment to the roll, and by entering it in the proper book, and referring in the margin of the entry of judgment, to the amendment by the order of such a date. The portions changed or omitted can be designated by brackets, underscoring, or otherwise; or the judgment may be entered anew as amended. (*Sluyter v. Smith*, 2 Bosw. 673). On amending the docket of a judgment as to the amount, a copy of the order should be filed in each of the clerk's offices in which a transcript has been filed, and a brief reference made to it in the several dockets. (*Hunt v. Grant*, 19 Wend. 90). An amendment to a defective jurat is not complete until the paper as amended has been served. (*Taylor v. Bogert*, 5 Paige, 33). Whenever a judgment is entered, or a paper is filed *nunc pro tunc*, the real date of the filing or entry should appear, as well as the date of the fictitious entry or filing. (*Barclay v. Brown*, 7 Paige 245). A copy of the order allowing the amendment, should always be served on the adverse party; and where the amendment is of a paper which has been served upon him, a copy as amended should be served (*Livermore v. Bainbridge*, 14 Abb. Pr. N. S. 232, note); but where a pleading is amended at the trial, it need not be served, unless the service is a condition of allowing the amendment. (*Lane v. Hayward*, 28 Hun, 583).

Sec. 4. Effect of Amendment.

Usually the court will not examine any proposed amendment to ascertain its effect, except to see that it is not frivolous or useless (*Mitchell v. Allen*, 25 Hun, 543; *The Mayor, etc. v. East Bay L. & Imp. Co.*, 41 App. Div. 567; *Bell Telephone Co. v. Home Tel. Co.*, 52 App. Div. 13); and leave to amend a proceeding, is not a sanction of the new proceeding, nor does it operate as a ruling that such amended proceeding is not obnoxious to legal objections. (*Ward v. Barber*, 1 E. D. Smith, 423). The

amended pleading or paper is a substitute for the old one, and the rights of the parties are controlled by the amended paper, unless the court otherwise directs. But such an amendment does not affect the rights of third parties which have already vested. (*Weeks v. Tomes*, 16 Hun, 349; *affd.*, 76 N. Y. 601). If a pleading has been amended, an injunction granted on the original pleading, does not thereby become inoperative. (*Selden v. Vermilya*, 4 Sand. Ch. 573).

ARTICLE II.

RELIEF AGAINST OMISSIONS AND MISTAKES.

The court may, in its discretion, and upon such terms as justice requires, and at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him, through his mistake, inadvertence, surprise, or excusable neglect; and may supply an omission in any proceeding. Where a proceeding taken by a party fails to conform to a provision of the code of civil procedure, the court may, in like manner, and upon like terms, permit an amendment thereof, to conform it to the provision. (Co. Civ. Proc. § 724). The relief sought under this section is sharply distinguishable from an application for a rehearing or a re-argument. (*Matter of Blackwell*, 48 App. Div. 230). To set running the period of one year mentioned in this section, the notice must be in writing. A mere verbal notice is not sufficient. (*Bissell v. N. Y. Cen. & H. R. R. Co.*, 67 Barb. 385). In case of a judgment, the notice must be given to the party personally; notice to his attorney alone, is not sufficient, unless it is brought to the notice of the party. (*O'Neil v. Hoover*, 17 Wk. Dig. 354). The case of *Jex v. Jacob* (7 Abb. N. C. 452), decided by the special term of the common pleas of the city of New York, holds that a notice to the attorney is sufficient; but this case must be deemed to be overruled by the case of *O'Neil v. Hoover*, cited above. The section does not include applications to set aside proceedings for irregularity, but only to those which

have been taken because of mistake, inadvertence, surprise, or excusable neglect of the party. It does not apply to special proceedings. (*Matter of City of Buffalo*, 78 N. Y. 362). The power of the court of original jurisdiction to open defaults, or to set aside or vacate judgments, or to permit pleadings to be served in furtherance of the ends of justice, does not depend upon this section of the code; but it exists independently of that, and inheres in the very constitution of the court. (*Ladd v. Stevenson*, 112 N. Y. 325). It is exercised continually, and it grows out of the control which the court has over its own records and judgments, and the actions pending therein. There are so many occasions for its exercise, that it should not be curtailed. (*Vanderbilt v. Schreyer*, 81 N. Y. 646, 648). It is not limited in matters of substance by this section of the code. (*Hatch v. Central Natl. Bank*, 78 N. Y. 487). The court has power to open a judgment two years after its entry, to supply an inadvertent omission of a finding of fact. (*Underwood v. Sutcliffe*, 21 Hun, 357). It may be exercised in favor of a party as well as against him; and one who has by mistake taken some proceeding in the action which is prejudicial to him, may have relief under this section. (*Diets v. Farish*, 43 Super. 87; *Montgomery v. Ellis*, 6 How. Pr. 326). It does not apply to an application for a new trial on the ground of newly discovered evidence. (*First Natl. Bank v. Heaton*, 6 T. & C. 37, 38, note). The power given by this section does not authorize the court to permit any act to be done after the time limited by statute. (*Coon v. Knapp*, 13 How. Pr. 175). The general rule is that a court cannot relieve a party who fails to serve notice of appeal in time (*Kelly v. Sheehan*, 76 N. Y. 325, 326), or who omits from a notice of appeal a certain order or judgment he wishes to appeal from. (*Lavalle v. Skelly*, 90 N. Y. 546). But under the power given by this section, it has been held that the court might permit a petition of appeal, from a decree of a surrogate's court to be filed, after the time had expired, if the preliminary proceedings to an appeal had been taken; where the omission to file the petition of appeal occurred through mistake. (*Stubbs v. Stubbs*,

11 Wk. Dig. 244). The court is not required by this section to give relief to a party if the application is made at any time within one year. The rule is that a party must make application for this kind of relief at the earliest practicable moment; and an unexplained delay is a good reason for refusing the relief, although the application is made within the year. (*Henderson v. Savage*, 46 Super. 221; *Wade v. DeLeyer*, 40 Super. 541; app. dismissed, see 63 N. Y. 318). Although an application is made within a year, yet it would be hardly proper for the court at special term to set aside a judgment, after it had been affirmed at the appellate division on the appeal of the party who moves to set it aside. (*Schweizer v. Raymond*, 6 Abb. N. C. 378). In imposing terms upon granting motions made under this section, the court is governed by the same considerations that apply to granting amendments to relief from irregularities.

ARTICLE III.

IRREGULARITIES.

SECTION.

1. What are irregularities.
2. Who may take advantage of irregularity.
3. Remedy for irregularity.
4. Waiver of irregularities.

Sec. 1. What Are Irregularities.

An irregularity, as defined by Mr. Graham, is the want of adherence to some prescribed rule, or mode of proceeding, and it consists in omitting to do something which is necessary for the due and orderly conducting of the suit, or doing it in an unseasonable time or improper manner. (Graham's Prac. 1 Ed. 566). The word imports an objection or a fault; it is not applied to departures from a rule which are wholly immaterial, but only to those which carry ill consequences, in rendering the proceedings defective or voidable. As illustrations of what constitute irregularities, may be mentioned: the service of summons on election day (*Bierce v. Smith*, 2 Abb. Pr. 411); service of summons by plain-

tiff himself (*Hunter v. Lester*, 10 Abb. Pr. 260; 18 How. Pr. 347); the issue of an execution after five years, without leave (*Montrait v. Hutchins*, 49 How. Pr. 105); the entry of judgment, where there is a defect in the affidavit of the service of the summons (*Moulton v. Carty*, 6 Robt. 470); the entry of separate judgments against each of the defendants in an action against partners upon a partnership obligation, instead of a joint judgment against all. (*Judd Linseed, etc. Co. v. Hubbell*, 76 N. Y. 543); an error in the form of a judgment, whereby its scope has been enlarged, or its amount increased beyond that authorized by the verdict, report, or decision. (*Corn Exchange Bk. v. Blye*, 119 N. Y. 414). Such proceedings as these, while they are irregular, do not involve the merits, nor any substantial right, and are said to be mere technical irregularities. There is a distinction between irregularities of this kind which affect no substantial right, and those which are a matter of substance, although the court may have jurisdiction. (*Decker v. Kitchen*, 21 Hun, 332). But where the court has jurisdiction, this distinction is of no particular importance, except with regard to the requirements of notice of motion, and the right to appeal from a refusal to vacate. There is a marked, and in many respects important and substantial distinction between irregularities of the nature mentioned above, which do not affect the jurisdiction of the court, and such as render the proceedings a total nullity, and altogether void. Where the proceeding adopted is that prescribed by the practice of the court, and the error is merely in the manner of conducting it, such an error is an irregularity and may be waived by the laches or the subsequent acts of the opposite party; but where the proceeding itself is altogether unwarranted, and totally dissimilar to that which the law authorizes, and one which the court has no jurisdiction to take under any circumstances, then the proceeding is a nullity, and it cannot be made good. (4 Wait's Pr. 630; 2 T. & S. 1028). As an illustration of such irregularities as cannot be amended, may be cited: a judgment

without service of process on the defendant (*Ferguson v. Crawford*, 70 N. Y. 253); or one ordered by a judge who is disqualified by consanguinity (*Chambers v. Clearwater*, 1 Abb. Ct. App. Dec. 341); or a sale on execution of property not attached, where a money judgment was rendered on service by publication only (*McKinney v. Collins*, 88 N. Y. 216); or an attempted service by publication, where the papers were not filed on or before the first day of publication, in accordance with section 442 of the code. (*Whiton v. Morning Journal Assn.*, 23 Misc. 299); or a judgment rendered on Sunday. (*Allen v. Godfrey*, 44 N. Y. 433). Such proceedings are utterly void, and they cannot be remedied in any way. (*Hone v. Woolsey*, 2 Edw. Ch. 289; *Anderson v. Roberts*, 18 Johns. 515).

Sec. 2. Who May Take Advantage of Irregularity.

A party to an action may always move to set aside an irregularity. (*Bacon v. Cropsey*, 7 N. Y. 195). Any person not a party, whose rights are injuriously affected by irregular proceedings in court, may apply to set aside or amend them. (*Gould v. Mortimer*, 26 How. Pr. 167; 16 Abb. Pr. 448; *Kellogg v. Howell*, 62 Barb. 280; *affd.* on op. below, 53 N. Y. 609; *Matter of Fuller*, 35 Hun, 162). As for instance, one who has a lien upon attached property (Co. Civ. Proc. § 682); or a subsequent judgment creditor, to vacate a judgment for irregularity. (*Butts v. Schieffelin*, 5 Civ. Proc. Rep. 415). Where a guardian *ad litem* for a plaintiff in partition had been improperly appointed, and his proceedings were dilatory, they were vacated on the application of a person who had been made a party defendant, but not served. (*Lyle v. Smith*, 13 How. Pr. 104). But with regard to persons who are not parties to the action, except where a statute gives them leave to move, they can only move to vacate for some irregularity which goes to the substance of the proceeding, and affects a substantial right, and injuriously operates upon their interests. They cannot move to vacate because of the mere technical irregularity. (*Gere v. Gundlach*, 57 Barb. 13; *Bridenbecker v. Mason*, 16 How. Pr. 203).

Sec. 3. Remedy for Irregularity.

If the irregularity is not a nullity, the only remedy is by a motion to set it aside; the question of irregularity cannot be raised by appeal in the first instance. (*Corn Ech. Bk. v. Blye*, 119 N. Y. 414). But a proceeding which is utterly void may be disregarded; or a party may resist it, and assert its invalidity at all times when it is set up against him. (*Spencer v. Barber*, 5 Hill, 568; *Hunt v. Wallis*, 6 Paige, 371; *Kamp v. Kamp*, 59 N. Y. 212). If, however, the court have jurisdiction to make the order, or to take any proceeding, or make any order, the order thus made is valid, however irregular or erroneous it may be; and it is good until it is vacated; and the party against whom it is made is bound by it. (*Pinckney v. Hagerman*, 4 Lans. 374; *affd.*, 53 N. Y. 31; *Perry v. Kent*, 88 Hun, 407; *affd. on op. below*, 157 N. Y. 710). For this reason, it is safest in all cases to move to vacate orders for irregularity, although there is strong reason to believe that they are utterly void; and a party is always at liberty to make these motions in such cases. (*Kamp v. Kamp*, 59 N. Y. 212, 217). A motion to set aside a proceeding for a mere irregularity must be made at the first opportunity, and before the moving party takes any step in the case (*Nichols v. Nichols*, 10 Wend. 560; *Low v. Graydon*, 14 Abb. Pr. 443; *Greenwood v. Marvin*, 29 Hun, 99); or the delay must be excused. (*Lawrence v. Jones*, 15 Abb. Pr. 110). If the party was ignorant of the fact that the irregular proceeding was had that fact is always a sufficient excuse. (*Giles v. Caines*, 3 Cai. 107). It is also a sufficient excuse that the motion was noticed for the previous term, which adjourned before it could be heard, and it was noticed for the earliest practicable moment afterwards. (*Whipple v. Williams*, 4 How. Pr. 28.) Ignorance of law, or of the rules of the court, on the part of the attorney for the party is not, however, an excuse. (*Moreland v. Sandford*, 1 Denio, 660). In England it has been held that the fact that the party himself was ignorant of the law, or that he was in prison and therefore unable to move is no excuse. (*Currey v. Bowker*, 9 Dowl. P. C. 523; *Claud v. McKenzie*, 5 Man. & Gr. 251). But it is

not believed that this rule would be applied in this state. The rule requiring a party to move at the earliest practicable moment, applies only to technical irregularities, so called; and not to those which affect a substantial right. (*Doty v. Russell*, 5 Wend. 129; *Lucas v. Trustees of Baptist Church*, 4 How. Pr. 353). Notice from the opposite party that he intends to take an irregular step in the action, requires no attention, and it does not make it necessary for his adversary to make any application to the court upon the subject. (*Vandenburg v. Van Rensselaer*, 6 Paige, 147). A motion to set aside a final judgment for irregularity, shall not be heard after the expiration of one year since the filing of the judgment roll; unless notice thereof is given for a day within the year, and either the hearing is adjourned, by one or more orders, until after the expiration of the year or the term for which it is thus noticed is not held. In the latter event, the motion can be noticed for, and heard at the next term, at which it can be made, held not less than ten days after the day when the first term was appointed to be held. (Co. Civ. Proc. § 1282). It will be noticed that the fact that a party has not received notice of the entry of judgment is not important under this section, in which respect it differs from section 724. The section does not apply to special proceedings, but only to judgments. (*Matter of City of Buffalo*, 78 N. Y. 362). The limit of time, within which the motion may be made, as fixed by this section, is controlling only with reference to technical irregularities (*Corn Ech. Bk. v. Blye*, 119 N. Y. 414; and it does not apply to a judgment entered without authority, against a party not before the court (*Diederick v. Richley*, 19 Wend. 109); nor to a judgment entered before the defendant's time to answer had expired (*Harris v. Warren*, 1 How. Pr. 139); nor to a judgment by confession, for defects in the statement (*Winnebrenner v. Edgerton*, 30 Barb. 185); nor where an answer had been served and disregarded (*Decker v. Kitchen*, 21 Hun, 332); nor where there was no answer, and judgment had been entered for a relief not demanded in the complaint (*Simonson v. Blake*, 12 Abb. Pr. 331); nor where

the judgment entered was without jurisdiction, or where it is subversive of a substantial right. (*White v. Coulter*, 59 N. Y. 629; *Simpson v. McKay*, 3 T. & C. 65). In all these cases, the court may set aside the judgment although one year has expired after its entry. (*Dinsmore v. Adams*, 5 Hun, 149; S. C., 49 How. Pr. 238). But, although a party is not precluded from moving to vacate the judgment for a technical irregularity during one year, the court is not bound to set it aside at any time before the expiration of one year. In these cases also, the rule obtains that the motion must be made promptly, or an excuse given for delay; and laches will defeat the motion. (*Orleans Co. Nat'l Bank v. Spencer*, 19 Hun, 569). As to the requirements of a notice of motion to set aside a proceeding for a technical irregularity, see chapter seven, article three, *ante*. But where the defect is not a mere technicality, but a substantial or jurisdictional irregularity, such irregularity need not be specified in the notice of motion. (*Jackson v. Smith*, 16 Abb. Pr. 201; 25 How. Pr. 476; *Decker v. Kitchen*, 21 Hun, 332; *Winnebrenner v. Edgerton*, 30 Barb. 185). All objections to the proceeding which is attacked, must be made in one motion. (Chapter VII, Article III, *ante*). On a motion to set aside a proceeding for irregularity, a moving party need not swear to merits. (*Depeyster v. Warne*, 2 Cai. 45; *Howell v. Denniston*, 3 Cai. 96). If the proceeding is irregular, and not within section seven hundred and twenty-three of the code, it must be set aside on motion, whether the applicant has merits or not. (*Hughes v. Wood*, 5 Duer, 603, note). Upon such a motion, only the irregular proceeding will be set aside, and no other one. For instance, where an inquest was taken regularly, but the judgment entered upon it was irregular, the court refused to set aside the inquest, although certain proceedings which were had before it was taken, were not strictly regular. (*Burger v. Baker*, 4 Abb. Pr. 11). Where a plaintiff had regularly taken the default of the defendant, but an irregular judgment was entered upon it, the judgment was set aside, but the default was permitted to

stand, and the plaintiff was permitted to enter another judgment. (*Griswold v. Stoughton*, 1 Cai. 6).

Sec. 4. Waiver of Irregularities.

An irregularity which goes to the jurisdiction of the court cannot be waived, for the court cannot get by consent the right to do any act, which it has not the jurisdiction to do. In other respects, the true rule with regard to the waiver of irregularity, is that any objection which does not deprive the court of jurisdiction, beyond the power of the parties to give jurisdiction to it, may be waived; and the distinction between nullities, and mere irregularities is to be found in the mode, rather than in the power of waiver. Thus, there can be no question that an appeal, taken by service of notice on the clerk alone, and not on the attorney, is utterly void; and yet, there can also be no doubt that the appeal could be made effectual and valid by express consent; and so where any notice is entirely omitted. (2 T. & S. 1033). A party is always at liberty to waive any statutory, or even constitutional privilege, which is made for his benefit, and having once waived it, he loses the right to object to it. (*Matter of Cooper*, 93 N. Y. 507). A person making a general appearance in an action, waives the objection that the process was void, or irregularly served upon him, or that it was not served upon him at all. (*Wheelock v. Lee*, 15 Abb. Pr. N. S. 24; reversed on other grounds, 64 N. Y. 242). The distinction between jurisdiction of the person, and of the subject matter must be borne in mind (*Weidman v. Sibley*, 16 App. Div. 616); a defendant by a general appearance, or by failure to object, cannot give the court power to do a thing which is not within its jurisdiction. (*Wheelock v. Lee*, 74 N. Y. 495). If a proceeding against him is a nullity, he may do nothing; and he does not thereby forfeit his right to object to it, whenever it is used against him. But he may proceed in the action as though the proceeding were regular, in which case, if it was one which under any circumstances might have been taken against him, he waives the right to

object to it. But there can be no waiver of an irregularity, unless the party knows the facts constituting the irregularity. (*Newbery v. Furnival*, 56 N. Y. 638; *Welford v. Oakley*, 1 Sheld. 261; S. C., 43 How. Pr. 118). If a party alleges his ignorance of an irregularity, to avoid what would otherwise be deemed a waiver of it, the burden of proof is upon him to show that he was ignorant of it. If the proceeding was irregular, the presumption would be that he knew it. If the irregularity is not a nullity, the intention to waive it will be inferred from an omission to object to it, when an opportunity thereafter was given. (*Matter of N. Y. West Shore & B. R. R. Co.*, 35 Hun, 575). A mere irregularity is waived by taking any step in the action with a knowledge of it; or by lying by and permitting the opposite party to take any step in the action without objection (*Mayor, etc. v. Lyons*, 1 Daly, 296); or by a failure to move promptly to set aside the proceeding; and of course, it is waived by consent, either verbal or written, or by a subsequent acquiescence in it. (*Farmers' Loan & T. Co. v. Reid*, 3 Edw. Ch. 414).

ARTICLE IV.

DEFECTS CURED BY VERDICT OR JUDGMENT.

In a court of record, where a verdict, report or decision has been rendered, the judgment shall not be stayed, nor shall any judgment of a court of record be impaired, or affected, by reason of either of the following imperfections, omissions, defects, matters, or things; in the process, pleadings, or other proceedings:

1. For want of a summons, or other writ.
2. For any fault or defect in process; or for misconceiving a process, or awarding it to a wrong officer.
3. For an imperfect or insufficient return of a sheriff, or other officer; or because an officer has not subscribed a return actually made by him.
4. For a variance between the summons and the complaint.

5. For a mispleading, insufficient pleading, or jeofail.
6. For want of a warrant of attorney by either party.
7. For the appearance by the attorney of an infant party, if the verdict, report, or decision, is in his favor
8. For omitting to allege any matter, without proof of which the verdict, report, or decision ought not to have been rendered.
9. For a mistake in the name of a party, or other person; or in a sum of money; or in the description of property; or in reciting or stating a day, month, or year; where the correct name, sum, description, or date has been once rightly stated, in any of the pleadings or other proceedings.
10. For a mistake in the name of a juror or officer.
11. For an informality in entering judgment, or making up the judgment roll.
12. For an omission on the part of a referee to be sworn; or for any other default or negligence of the clerk, or any other officer of the court, or of a party, his attorney or counsel, by which the adverse party has not been prejudiced. (Co. Civ. Proc. § 721).

Each of the omissions, imperfections, defects and variances, specified in the last section, and any other of like nature, not being against the right and justice of the matter, and not altering the issue between the parties, or the trial, must when necessary be supplied, and the proceeding amended, by the court wherein the judgment is rendered, or by an appellate court. (Co. Civ. Proc. § 722).

CHAPTER XX.

ABATEMENT AND REVIVAL.

ARTICLE I....When actions abate.

ARTICLE II....Continuance upon death of party.

ARTICLE III....Transfer of interest or devolution of liability.

ARTICLE IV....How new parties brought in.

ARTICLE V....When court may order action abated.

ARTICLE VI....Effect of verdict, report or decision.

ARTICLE I.

WHEN ACTIONS ABATE.

SECTION.

1. General rule.
2. Rules applicable to particular actions.

Sec. 1. General Rule.

An action does not abate by any event, if the cause of action survives or continues. A special proceeding does not abate by any event, if the right to the relief sought in such special proceeding survives or continues, but this provision as to a special proceeding applies only to cases where a party dies after 1891 [when the amendment to this section took effect]. (Co. Civ. Proc. § 755). This amendment does not apply to proceedings in the surrogate's courts. (*Matter of Camp*, 81 Hun, 387). The assignability and survivability of things in action have frequently been held to be convertible terms, and perhaps furnish as clear and intelligible a rule to determine what injuries to property rights or interests survive, as it is possible to lay down. (*Hegerich v. Keddie*, 99 N. Y. 258). The qualities of assignability and survivability are tests of each other, and have been declared by the court of appeals to be convertible terms.

(*Blake v. Griswold*, 104 N. Y. 613, 616). The rules of the common law still determine the survivability of actions for torts, except where the law has been specially modified, or changed by statute. (*Hegerich v. Keddle*, *supra*). The revised statutes provide that for wrongs done to the property rights or interests of another, for which an action might be maintained against the wrong doer, such action may be brought by the person injured, or after his death, by his executors or administrators, in the same manner and with the like effect in all respects, as actions founded upon contract. (R. S. Pt. 3, Chap. 8, T. 3, § 1 [Banks & Bros., 9 Ed. Vol. 2, p. 1907]). But the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator. (Id. § 2). On this subject the court of appeals has said: "If this language of the statute be collocated and read according to its plain meaning and intent, the following sentence would seem to be the result: Actions by and against executors and administrators, for wrongs done to the property rights, or interests of their intestate or testator are hereby authorized, but so far as such wrongs have heretofore been remediable by actions on the case for injuries to the person of the plaintiff, or to the person of the intestate or testator of any executor or administrator, they shall not survive the death of the person to whom, or by whom the wrong is done." The court holds that the wrongs referred to in these sections are such only as are committed "upon the property rights, or interests" of the testator or intestate, and to a cause of action for which the executors and administrators acquired a derivative title alone. The whole scope and design of the statute is to extend a remedy already accrued, to the representatives of a deceased party, and provide for the survival only of an existing cause of action. (*Hegerich v. Keddle*, *supra*, pp. 261, 262). Sections 1902, 1903 and 1904 of the code of civil procedure modify to some extent the provisions of the revised statutes on this subject, by giving an

executor or administrator of a decedent a right of action to recover damages against the wrong doer for the pecuniary injury caused by the decedent's death. (*Matter of Meekin v. Brooklyn Heights R. R. Co.*, 164 N. Y. 145). It is questionable whether sections nineteen hundred and nine and nineteen hundred and ten of the code of civil procedure extend the right of assignment of a cause of action, but if they do have that effect, the law as to the survival of causes of actions has not yet been changed by them. (*Blake v. Griswold*, 104 N. Y. 613). Section 755 declares the paramount rule, and, if the cause of action survives or continues, the action does not abate whether the particular case is mentioned in sections 757, 758 and 759, or not; these last named sections were enacted to provide for special cases and not to limit to those cases only the power of the court to continue an action. (*Lyon v. Park*, 111 N. Y. 351). It has long been a prevalent conception, both upon the bench and at the bar, that the dissolution of a corporation had the same effect so far as the question of abatement is concerned as the death of an individual (*Matter of N. Y. Oxygen Co.*, 24 Civ. Proc. Rep. 398; *Grafton v. Union Ferry Co.*, 22 Civ. Proc. Rep. 402), unless there was some statutory provision continuing the cause of action (*Marsteller v. Mills*, 143 N. Y. 398); but a very recent decision of the court of appeals has laid down a decidedly different rule, and practically all actions would seem to be continuable now against the former directors of the defunct corporation to the extent of the corporation's property in their hands. (*Shayne v. Evening Post Publishing Co.*, 168 N. Y. 70).

Sec. 2. Rules Applicable to Particular Actions.

Subdivision 1.—WHAT DOES NOT ABATE.

The following actions do not abate: all actions arising on contract (*Holsman v. St. John*, 90 N. Y. 461, 463); actions for taking and carrying away personal property (*Heinmuller v. Gray*, 35 Super. 196); actions for damages for trespass on real property (*Matthews v. D & H. C. Co.*, 20 Hun, 427; *Hegerich v. Keddle*, 99 N. Y.

258, 261, 262; *Bond v. Smith*, 4 Hun, 48; *Sullivan v. N. Y. El. R. R. Co.*, 14 Misc. 426); a taxpayer's action (*Gordon v. Strong*, 158 N. Y. 407); an action by a husband against a carrier, to recover for the loss of the services of his wife, and expenses paid by him in consequence of an injury to her (*Cregin v. Brooklyn C. T. R. R. Co.*, 75 N. Y. 192); an action brought by an administrator under section 1902 of the code of civil procedure to recover damages for negligence causing the decedent's death (*Matter of Meekin v. Brooklyn Heights R. R. Co.*, 164 N. Y. 145), but the substituted administrator, not the personal representative of the deceased administrator, should continue it (*Hodges v. Webber*, 65 App. Div. 170); an action against a stockholder, to enforce the personal liability against him for debts of the corporation, until the capital has been paid in (*Chase v. Lord*, 77 N. Y. 1); an action by the receiver of a bank against a director thereof to recover damages for losses sustained by the bank by reason of the negligent conduct of its directors (*O'Brien v. Blaut*, 17 App. Div. 288); a cause of action under the speculation act (Co. Civ. Proc. § 1969; *People v. Starkweather*, 40 Super. 453); a cause of action against a plumber, for improperly repairing, owing to which the health of the plaintiff and his family was injured by escaping gas, and for trouble and expense in providing care and medical treatment for the plaintiff's children, was held to abate by the plumber's death, in so far as the action was brought for damages to the plaintiff's person, but to survive in respect to damages and expenses occasioned by the sickness of the children (*Scott v. Brown*, 24 Hun, 620); an action to recover damages for fraudulent representations, made by the seller of property, or by one who conspires with the seller to defraud the plaintiff, and gets some advantage from the sale (*Haight v. Hayt*, 19 N. Y. 464; *Moore v. McKinstry*, 37 Hun, 194); or an action by a former owner of a valuable contract to recover damages for fraud and conspiracy, by means of which the defendants induced the plaintiff to transfer such contract to one of the defendants (*Lyon v. Park*, 111 N. Y. 351); an action by members of a firm

for slander relating to the financial condition of the firm, does not abate by the death of one partner but vests in the survivors (*Shale v. Schantz*, 35 Hun, 622); an action for specific performance brought against executors, does not abate by the death of one defendant (*Patterson v. Copeland*, 52 How. Pr. 460); an action against several defendants, to compel an accounting by them, does not abate by the death of one defendant; but his executor may be substituted. (*Halstead v. Cockcroft*, 40 Super. 519; *Krumbeck v. Clancy*, 41 App. Div. 397). The estate of a person or party, jointly liable upon contract with others, shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent, when it is necessary to do so for the proper disposition of the matter. (Co. Civ. Proc. § 758). The rule laid down by this portion of section 758 has changed, doubtless the rule laid down in *Risley v. Brown* (67 N. Y. 160), so far as the ultimate liability of the estate of the deceased joint debtor is concerned (*Randall v. Sackett*, 77 N. Y. 480; *Matter of Robinson*, 40 App. Div. 23, 25); but it is not to be assumed that, because such estate may be reached in some way, that result can be obtained by joining the personal representatives of the deceased in the action against the surviving joint debtors; such joinder should not be ordered except upon the allegation of the insolvency of the survivors. (*First National Bank of Jersey City v. Lenk*, 10 N. Y. Supp. 261; *affd.* without op., 123 N. Y. 638). There may be an obligation in equity where the joint obligors are principal debtors, however, and in such cases it would seem the personal representatives should be brought in. (*Richardson v. Draper*, 87 N. Y. 337). What has been said on this matter has no application, of course, to cases where the liability is joint and several; in such cases the personal representatives should be brought in. (*Heinmuller v. Gray*, 35 N. Y. Super. Ct. Rep. 196). The section applies only to contracts made after its passage. (*Randall v. Sackett*, 77 N. Y. 480). A partition suit does not abate upon the death of the sole party plaintiff. (*Cheney v. Rankin*, 27 Misc. 609). By the revised

statutes, and action of ejectment did not abate by the death of the plaintiff. (2 Rev. Stat., 308, § 32; *James v. Bennett*, 10 Wend. 540). Under that section of the statute, it was held that the action abated by the death of a sole defendant. (*Putnam v. Van Buren*, 7 How. Pr. 31). That portion of the revised statutes has now been repealed, however, and an action of ejectment does not abate by the death of any of the parties. (Co. Civ. Proc. §§ 1521, 1522, 1523). Although an action to restrain a defendant from cutting timber, abates by his death, yet it may be continued by the executors of the plaintiff, to recover damages for timber already cut. (*Matthews v. D. & H. C. Co.*, 20 Hun, 427). An action of replevin does not abate by the death of either party. (Co. Civ. Proc. § 1736). The marriage of a female plaintiff does not abate the action, but it will be continued in her new name, as a matter of course. (*Mapes v. Snyder*, 59 N. Y. 450).

Subdivision 2.—WHAT ACTIONS DO ABATE.

The following actions abate by death: an action for divorce (*Hopkins v. Hopkins*, 21 Wk. Dig. 174; *Millady v. Stein*, 19 Misc. 652); an action for dower, by the death of the plaintiff before interlocutory judgment (*McKeen v. Fish*, 33 Hun, 28), unless the court has announced its decision that the report of the referee granting the plaintiff dower would be confirmed (*Robinson v. Govers*, 138 N. Y. 425); an action by a tenant for life, to recover real property; but his administrators may after his death, revive the action to recover damages to his estate, by reason of the detention of the property (*DeLisle v. Hunt*, 36 Hun, 620); an action for breach of promise to marry (*Wade v. Kalbfleisch*, 58 N. Y. 282); for the seduction of the plaintiff's daughter (*Holliday v. Parker*, 23 Hun, 71); for inveigling the plaintiff by false representations, into a void marriage (*Price v. Price*, 75 N. Y. 244); libel or slander (*Spooner v. Keeler*, 51 N. Y. 527); a cause of action to recover damages for knowingly letting an unhealthy tenement, and thus causing the death of plaintiff's child (*Victory*

v. *Krauss*, 41 Hun, 533) ; an action to restrain defendant from cutting timber on the lands of the plaintiff abates by the death of the defendant (*Johnson v. Elwood*, 82 N. Y. 362) ; an arbitration abates by the death of either party (*Manning v. Pratt*, 18 Abb. Pr. 344) ; an action to recover damages for the negligent killing of plaintiff's testator, abates by the death of the wrong doer (*Hege-rich v. Keddie*, 99 N. Y. 258) ; an action to recover damages for personal injuries to the plaintiff, abates by death of the plaintiff, or of the wrong doer (*Cox v. N. Y. Cen. & H. R. R. Co.*, 63 N. Y. 414) ; an action brought under the civil damage act, abates by the death of the defendant (*Moriarty v. Bartlett*, 99 N. Y. 651) ; an action against a physician for malpractice for causing injuries to plaintiff's person, abates by his death (*Best v. Vedder*, 58 How. Pr. 187) ; an action against a trustee of a corporation, to recover the penalty for failure to make a report, or for making a false report, abates by the death of either party. (*Stokes v. Stickney*, 96 N. Y. 323 ; *Brackett v. Griswold*, 103 N. Y. 425 ; *Boyle v. Thurber*, 50 Hun, 259). In an action for a personal injury, if the defendant stipulate, as a condition of obtaining a postponement, that if the plaintiff die before verdict, the cause of action shall not abate, it will survive ; and in such a case the plaintiff's testator will be substituted as plaintiff (*Cox v. N. Y. Cen. & H. R. R. Co.*, 63 N. Y. 414 ; *McGuire v. Same*, 6 Daly, 70) ; but where a nonsuit was granted in an action to recover damages for a personal injury, which was reversed by the general term, the stipulation for judgment absolute, given upon an appeal to the court of appeals, does not prevent the abatement of the action. (*Corbett v. 23d. St. Rwy. Co.*, 114 N. Y. 579). It was formerly held that a special proceeding to vacate an assessment abated by the death of the petitioner, and could not be revived by his executor (*Matter of Palmer*, 115 N. Y. 493) ; but the amendment of 1891 to section 755 has changed this rule. The imprisonment of the person in state prison for life, or for a term of years, deprives him of all rights as a plaintiff in the action ; but does not free him from all liability as a defendant. He does not thereby acquire

immunity from the claims of private individuals, or the necessities of public justice. The statute suspends his rights alone, and not the rights of others against him; although he cannot sue, he may be sued, and the suit may be prosecuted to judgment against him. And in general, he is subject to be proceeded against in all the modes prescribed by law to enforce civil remedies, as if he were at large. (*Bonnell v. R. W. & O. R. R. Co.*, 12 Hun, 218, 219, and cases cited).

ARTICLE II.

CONTINUANCE UPON DEATH OF PARTY.

SECTION.

1. When sole party dies.
2. When one of several parties dies.

Sec. 1. When Sole Party Dies.

In case of the death of a sole plaintiff, or defendant, if the cause of action survives or continues, the court must, upon a motion, allow or compel the action to be continued by or against his representative, or successor in interest. In case of the death of a sole party to a special proceeding after this act takes effect [1891], if the right to the relief sought in such proceeding survives or continues, the court must, upon a motion, allow or compel such proceeding to be continued by or against his representative, or successor in interest. This provision as to a special proceeding does not apply where provision for such continuance has been otherwise made by law. (Co. Civ. Proc. § 757). Where a sole defendant dies, it is usual to enter a suggestion of the fact on the record, and thereupon all subsequent proceedings are suspended until the representative is brought in. (*Wamsley v. Horton & Co.*, 87 Hun, 347). If there were originally more than one defendant in the action, and all but one have died, that one is a sole defendant within this section. (*Coit v. Campbell*, 82 N. Y. 509). The section applies to a case where both parties to the action are dead. (*Holsman v. St. John*, 90 N. Y. 461).

The substitution in all cases is to be made by a motion, and not by a supplemental complaint, as was required in some cases under the code of procedure. (*Coit v. Campbell, supra; Holsman v. St. John*, 90 N. Y. 461). An action cannot be maintained to procure a substitution of the representatives of a party who is dead. (*Miller v. Rogers*, 18 Wk. Dig. 119). It was held, at one stage of the development of the decisions on this subject, that in actions at law this section gave the court no discretion to deny, on account of laches or lapse of time, the application for a continuance or a revival (*Holsman v. St. John, supra*), though there was no such absolute right given by this provision to the representatives of a deceased sole plaintiff or defendant in an equity suit (*Coit v. Campbell, supra*); there was early shown a tendency on the part of the courts to escape from the doctrine laid down in the former case with reference to actions at law (*Lyon v. Park*, 111 N. Y. 351), and the recent case of *Pringle v. Long Island R. Co.* (157 N. Y. 100), after a review of the authorities on the subject, overrules *Holsman v. St. John (supra)*, and lays down the same rule for both legal and equitable actions, i. e., laches on the part of plaintiff in moving for a revivor may be an answer to such a motion. If the personal representative has been guilty of no laches, the motion should be granted, although important witnesses for the other side have died during a delay occasioned by the decedent. (*Markell v. Nester*, 29 App. Div. 59; app. dismissed, 157 N. Y. 700). It has been held, at special term, that the continuance may be granted conditionally upon the giving of security for costs. (*Knoch v. Funke*, 22 Civ. Proc. Rep. 161). Of course adequate reasons must be shown for the imposition of the condition. (*Collins v. Jewell*, 3 Misc. 341). It has been held that whenever a sole party has died, the defendant cannot move to substitute the personal representatives of the deceased party, unless he has acquired some right in the litigation, as by pleading a counter-claim and that his remedy is under section seven hundred and sixty-one of the code of civil procedure.

(*Republic of Peru v. Reeves*, 40 Super. 316; *Livermore v. Bainbridge*, 49 N. Y. 125). But since the amendment of section seven hundred and fifty-seven of the code of civil procedure which was made in 1879, it has been held that the privilege of having the action revived is given to the defendant as well as to the plaintiff, and that the motion for revivor may be made by the personal representatives of a deceased defendant. (*Pierson v. Morgan*, 44 Hun, 517; *Dalton v. Sandland*, 4 Civ. Proc. Rep. 73). When a counter-claim had been interposed, and issue joined upon it, it was always held that the defendant has acquired such an interest in the action as entitles him to move. (*Livermore v. Bainbridge*, *supra*). The successors in interest who are to be substituted, are the owners of the right which is the subject of litigation; as the heirs-at-law, where the action is in regard to real estate, or the executors or administrators, if it is in regard to personal property. (*Green v. Martine*, 1 Civ. Proc. Rep. 129; *affd.* 27 Hun, 346). The administrator *de bonis non* should be substituted in place of the administrator, in an action for damages for decedent's death under section 1902 of the code (*Mundt v. Glokner*, 24 App. Div. 110; *app. dismissed*, 160 N. Y. 571), and not the personal representatives of the deceased administrator. (*Hodges v. Webber*, 65 App. Div. 170). In an action to compel the determination of a claim to real property, where the plaintiff died leaving a will devising the subject matter of the suit, the devisee was held to be the proper "successor in interest" to be substituted. (*Higgins v. Mayor, etc.*, 136 N. Y. 214). Where the plaintiff dies, and he or his executors have assigned the cause of action, the assignee should be substituted as party plaintiff (*McNulta v. Huntington*, 62 App. Div. 257; *McLachlin v. Brett*, 27 Hun, 18; *app. dismissed*, 90 N. Y. 653), although a counter-claim has been interposed by the defendant. (*Schlichter v. South Brooklyn Saw M. Co.*, 35 Hun, 339). Where an assignee moves to be substituted as a party plaintiff, he must give *prima facie* proof of his title. (*St. John v. Croel*, 10 How. Pr. 253). A dispute as to title must be raised and decided upon the motion for substitution.

(*Smith v. Zalinski*, 94 N. Y. 519). Where an action of ejectment is brought by the grantee in the name of his grantor, pursuant to section fifteen hundred and one of the code, and the grantee has died, his devisees may have the action revived. (*Ward v. Reynolds*, 25 Hun, 385). But where such an action is brought by the grantee in the name of several grantors, and part of them died before trial, the proper practice is to amend the complaint and proceed *de novo*, as in a case where an answer of defect of parties plaintiff has been interposed. (*Doherty v. Matsell*, 53 Super. 73). If, in an action to recover real estate, the plaintiff should die, leaving a widow and heirs-at-law, she need not, as widow, join with the heirs-at-law in an application to revive the action, as long as her dower has not been assigned. (*Ash v. Cook*, 3 Abb. Pr. 389). In an action for an accounting and to recover a balance due, the devisees are not proper persons to be substituted on the death of the defendant, but the executors only succeed to the cause of action. (*Green v. Martine*, 1 Civ. Proc. Rep. 129; *affd.*, 27 Hun, 246). Where, in an action to foreclose a mortgage, a defendant has parted with his interest *pendente lite*, and died, the executors, and not the heirs, are the proper parties to be substituted as defendant. (*Weyh v. Boylan*, 14 Wk. Dig. 247). An action may be revived against infant representatives. (*Wilkinson v. Parish*, 3 Paige, 653). It was formerly held that, from the time of granting a provisional remedy, the court acquires sufficient jurisdiction of the action to substitute the representatives of a defendant, who dies before the summons is served (*More v. Thayer*, 10 Barb. 258); but, since the addition in 1866, to section 227 of the code of procedure, of the clause requiring service of the summons to be made, or publication to be commenced within thirty days (which clause was continued in, and is now in force, as, section 416 of the code of civil procedure), the rule has been that, by the provisional remedy the court acquires no jurisdiction at all unless the summons is served personally, or by publication, upon the original defendant within the required time; where the original defendant dies, therefore, before service by pub-

lication has been begun, or completed, the court cannot continue the action against the deceased defendant's personal representatives, or preserve against such representative the vitality of the lien acquired by the provisional remedy. (*Barron v. So. Brooklyn Saw Mill Co.*, 18 Abb. N. C. 352; *Ludwig v. Blum*, 43 N. Y. St. Rep. 616). The executor may be substituted as a party plaintiff after judgment. (*Robinson v. Brisbane*, 7 Hun, 180); app. dismissed on op. of court below, 67 N. Y. 606). Where a motion is made to substitute the personal representative, in the place of a deceased party, if the pleadings show that the cause of action is one that survives, the court will not hear affidavits to the contrary. (*Wing v. Ketcham*, 3 How. Pr. 385). If the defendant's representatives have procured themselves to be substituted as parties, after his death, the court will not vacate the order because the action did not survive against them. (*Arthur v. Griswold*, 2 Hun, 606; 60 N. Y. 143). An objection that the personal representatives have not been brought in as parties, may be taken at the trial. (*Hasbrouck v. Bunce*, 62 N. Y. 475). Where the court has substituted the executor of the plaintiff, an objection cannot be taken that there is no allegation of the death of the party, or proof of it on the trial. (*Isham v. Davison*, 3 T. & C. 745). Where the action is revived, the issue and proceedings are taken up at the point where the death of the party as to whom the change is made, left them; the new or substituted party takes the place of the prior one, and the case is revived, and proceeds in all respects, as if the new party had been in the case from the beginning; but this applies solely to the proceedings to enforce a right of action, and not to the right of action itself. (*Cregin v. Brooklyn C. T. R. Co.*, 83 N. Y. 595, 598). Where a cause of action which survives is joined with one which does not, the court may grant a continuance of the action which survives, on condition that the defendant stipulates to strike the other cause of action from the complaint. (*Forster v. Cantoni*, 19 App. Div. 306).

Sec. 2. When One of Several Parties Dies.**Subdivision 1.—IF THE ENTIRE CAUSE OF ACTION SURVIVES.**

In case of the death of one of two or more plaintiffs, or one of two or more defendants, if the entire cause of action survives to or against the others, the action may proceed in favor of or against the survivors. But the estate of a person or party jointly liable, upon contract, with others, shall not be discharged by his death. And the court may make an order to bring in the proper representative of the decedent, when it is necessary to do so for the proper disposition of the matter; and where the liability is several as well as joint, may order a severance of the action, so that it may proceed separately against the representative of the decedent, and against the surviving defendant or defendants. (Co. Civ. Proc. § 758). If one of several plaintiffs dies, and the cause of action continues to his survivors, such survivors have a right to proceed, and they cannot be compelled to substitute the representatives of the deceased plaintiff. (*Williamson v. Moore*, 5 Sand. 647). In an action by partners, if one dies, the remaining members continue the action in their names. (*Taylor v. Church*, 9 How. Pr. 190). So in an action for slander against a firm. (*Shale v. Schantz*, 35 Hun, 622). If a judgment by default has been entered against the survivors, it cannot be revived against the administrator of a deceased partner; but a new action must be brought against him, where it is sought to enforce the liability against his estate. (*Masten v. Blackwell*, 8 Hun, 313). Where, in an action brought by two partners, judgment has been recovered and satisfied as to one, but not as to the other, and the latter one dies, his personal representatives may be substituted as plaintiffs, for he has become practically a sole plaintiff in the cause. (*Hackett v. Belden*, 10 Abb. Pr. N. S. 123; *affd.*, 47 N. Y. 624). Where an action is brought by tenants in common for conversion of property, if one of the plaintiffs dies, the action should be continued in the name of the survivors,

without substituting the executor of the deceased plaintiff. (*Bucknam v. Brett*, 35 Barb. 596; 13 Abb. Pr. 119). Where an action of ejectment is brought by tenants in common, one of whom dies, his heirs-at-law must be substituted, or the remaining plaintiffs can only recover the interest which they have in the premises. (*Hasbrouck v. Bunce*, 62 N. Y. 475). If the defendant who dies was not a necessary party, the action may proceed without regard to his death (*Hancock v. Hancock*, 22 N. Y. 568), although he was a proper party (*Lemon v. Smith*, 20 App. Div. 523); but an order should be entered, reciting the fact of his death, and dropping him out of the case. (*Halstead v. Cockroft*, 49 How. Pr. 342). But after a defendant has acquired a right or interest against a co-defendant, as for example, after an interlocutory judgment on his counter-claim has been entered, he may on the death of his co-defendant bring in his executors by motion. (*Halstead v. Cockroft*, 40 Super. 519). The second sentence of section seven hundred and fifty-eight, as above cited, does not change the rule that, where one of two or more joint debtors die, his personal representatives should not be joined in the action with his survivors, except upon the allegation of the insolvency of the survivors, (*First National Bank of Jersey City v. Lenk*, 10 N. Y. Supp. 261; *affd.* without op., 123 N. Y. 638), though it, doubtless, does alter the rule as to the ultimate liability, as we have seen. There may be an obligation in equity where the joint obligors are principal debtors, however, and in such cases it would seem the personal representatives should be brought in. (*Richardson v. Draper*, 87 N. Y. 337). If the defendants are jointly and severally liable, and one of them dies, the plaintiff may treat the action as abated as to him, and proceed against the other defendants (*Gardner v. Walker*, 22 How. Pr. 405); or if the action is for a tort which survives, continue it as a separate action against the representatives of the deceased defendant. (*Heinmuller v. Gray*, 35 N. Y. Super. Ct. Rep. 196). It is proper practice to revive against the representative of a deceased defendant, and to sever the

action, and to continue it as two actions. (*Bond v. Smith*, 4 Hun, 48). In such a case, if the action is partly tried, and the testimony of the plaintiff has been taken, the order, reviving the action against the representatives of one defendant, should be without prejudice to an application to strike out such part of the plaintiff's testimony as is incompetent against the executors. (*Id.*). An order substituting or refusing to substitute representatives of the deceased party, is appealable to the appellate division. (*St. John v. Crocl*, 10 How. Pr. 253).

Subdivision 2.—IF PART OF THE CAUSE OF ACTION SURVIVES.

In case of the death of one of two or more plaintiffs, or one of two or more defendants, if part only of the cause of action, or part or some of two or more distinct causes of action, survives to or against the others, the action may proceed, without bringing in the successor to the rights or liabilities of the deceased party; and the judgment shall not affect him or his interest in the subject of the action. But where it appears proper so to do, the court may require or compel the successor, or a person who claims to be the successor, to be brought in as a party, upon his own application, or upon the application of a party to the action. (Co. Civ. Proc. § 759). This section seems to relate to equitable actions, and was designed to put into statutory form the rule laid down in *Leggett v. Dubois* (2 Paige, 211); *White v. Buloid* (*Id.* 475); and *Hoffman v. Tredirell* (6 Paige, 308). (*Lyon v. Park*, 111 N. Y. 351, 356).

Subdivision 3.—IN OTHER CASES.

As has been noted heretofore, the court has power to continue an action, which does not abate, despite the fact that the particular circumstances of the case do not bring it within the provisions of sections 757, 758, or 759. In all cases covered by section 755, the action does not abate, but an application to the court is necessary to authorize its revival or continuance, and such

application will be denied where the moving party has been guilty of inexcusable laches, or where, otherwise, irreparable injury will be suffered. (*Lyon v. Park*, 111 N. Y. 351).

ARTICLE III.

TRANSFER OF INTEREST, OR DEVOLUTION OF LIABILITY.

SECTION.

1. Actions in general.
2. Actions by or against public officers.
3. Special cases.

Sec. 1. Actions in General.

In cases of a transfer of interest, or devolution of liability, the action may be continued by or against the original party; unless the court directs the person to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action, or joined with the original party, as the case requires. (Co. Civ. Proc. § 756). This section contemplates a transfer other than by death of a party. A party succeeding to the plaintiff's rights, may continue to prosecute the action in the plaintiff's name, as though no change had taken place. (*Burton v. Burton*, 57 App. Div. 113; *Arnold v. Keyes*, 37 Super. 135). Though the action is continued in the name of the original plaintiff, the assignee controls the action, its course and disposition. (*Hirshfeld v. Fitzgerald*, 157 N. Y. 166); and he is bound by the judgment. (*McGean v. Met. Fl. Rwy. Co.*, 133 N. Y. 9). It is optional with the court whether or not to allow the substitution of the assignee. (*Getty v. Spaulding*, 58 N. Y. 636). Ordinarily, however, it will be granted upon a proper application, unless the court can see that it would prejudice some right of the defendant; in which case the court will refuse it, or grant it on terms. (*Howard v. Taylor*, 5 Duer, 604). It was formerly held that, where a cause of action had been assigned, the assignee would be substituted only upon his own application. (*Howard v. Taylor*, *supra*; *Packard v. Wood*, 17 Abb. Pr. 318); but these cases have

been overruled and it has been settled by the cases of more recent date that section 756 gives the court general discretionary power to bring in such assignee, even upon application of the opposite party. (*De Bost v. Albert Palmer Co.*, 1 How. Pr. N. S. 508). An assignee in bankruptcy may carry on a suit in the name of the bankrupt corporation; and it is not necessary that he should be substituted, or that he should procure an order to carry it on. (*Platt v. Ashman*, 32 Hun, 230). Where an application is made by an assignee to be substituted in the place of his assignor as plaintiff, and notice of such application is given to the defendant, the title of the assignee must be tested, if at all, upon the motion. (*Smith v. Zalinski*, 26 Hun, 225; *affd.*, 94 N. Y. 519). In an action for partition, if one defendant transfers his interest after the case has begun, the transferee may be substituted in his place (*Hornfager v. Hornfager*, 6 How. Pr. 13); but where the defendant in ejectment transfers his interest, if a notice of *lis pendens* has been filed, the suit may be continued against the original party without notice to the grantee, and upon the judgment and writ of possession, such grantee may be dispossessed. The action is founded upon a tort, that is, for the entry into the lands of another, and unlawfully withholding possession from him; and the grantee does not become liable to the action, unless he enters and claims to hold the possession adversely to the plaintiff. (*Mosley v. Alb. & Northern R. R. Co.*, 14 How. Pr. 71). Where a receiver of a corporation has been appointed, it is not necessary that the action against the corporation should be continued against the receiver, before a plaintiff can take judgment. But if judgment is so taken, the court may open it, and allow the receiver to defend, upon good cause shown (*Knauer v. Knauer*, 11 Reporter, 100); or the plaintiff in a proper case, may procure the receiver to be substituted as defendant. (*People v. Universal L. Ins. Co.*, 17 Wk. Dig. 563). A dissolution of a corporation terminates actions against it, and all subsequent proceedings are void, unless they are continued by the court, as prescribed by law. (*McCulloch v. Norwood*, 58 N. Y. 562). So,

where a receiver, by direction of the court but without formal substitution, assumes control of an appeal taken by the corporation before his appointment and secures a reversal of the judgment against the corporation, the funds in his hands will not be affected by a judgment on a new trial in which he took no part. (*People v. Knickerbocker Life Ins. Co.*, 106 N. Y. 619). Where an action is pending against a foreign corporation, the continuance of it is a matter of practice, and it must be done as required by the laws of this state. (*Sturges v. Vanderbilt*, 73 N. Y. 384). Where two railroad companies are consolidated, the consolidated company will not be substituted in an action against one of the old companies, unless with regard to some contract or lien which the new company has assumed, or which devolved upon it. (*Prouty v. Lake Shore & M. S. R. R. Co.*, 52 N. Y. 363). The substituted party is bound by the acts of his predecessor in the progress of the case, and he is entitled to the benefit of all the proceedings had. (*Thwing v. Thwing*, 9 Abb. Pr. 323; 18 How. Pr. 458; *Moore v. Hamilton*, 44 N. Y. 666).

Sec. 2. Actions by and Against Public Officers.

Where an action or special proceeding is authorized or directed by law, to be brought by or in the name of a public officer, or by a receiver or other trustee, appointed by virtue of a statute, his death or removal does not abate the action or special proceeding; but the same may be continued by his successor, who must, upon his application, or that of a party interested, be substituted for that purpose by the order of the court, a copy of which must be annexed to the judgment roll. (Co. Civ. Proc. § 766). It is optional with parties whether to apply or not, and until they do, the suit should proceed in the name of the original parties. (*Manchester v. Herrington*, 10 N. Y. 164). Where a sheriff dies after having brought an action under section six hundred and fifty-five of the code, to recover attached property, his successor in office, and not his personal representatives, should be substituted as parties. (*Orser v. Glenville Woolen Co.*, 11 Abb. Pr. N. S. 85; 60 Barb. 371). On

the death of a public officer, pending an action brought by him, as such, his successor in office, and not his personal representatives, should be substituted. (*Pratt v. Secley*, 20 Wk. Dig. 280). But where a suit has been brought against him for his own tort, upon his death it cannot be continued against his successors, but his personal representatives should be substituted as defendants, if the action is one which survives. (*Hughes v. Rathbone*, 3 Alb. Law. J. 71; *Hamilton v. Gorman*, 14 Misc. 114). The language of section seven hundred and sixty-six includes special proceedings, and therefore the case of the *People v. Oswego Court of Sessions* (2 T. & C. 431), which holds that a special proceeding against a public officer cannot be continued against his successor, is no longer law. The section refers to statutory receivers only. (*Hegewisch v. Silver*, 140 N. Y. 414, 420).

Sec. 3. Special Cases.

The provisions of sections seven hundred and fifty-five to seven hundred and sixty-one of the code of civil procedure, do not apply to a case where special provision is otherwise made by law. (Co. Civ. Proc. § 762). The special cases referred to in this section, are actions of ejectment and partition. The rules for the substitution of parties in ejectment are laid down in the following sections:

The provisions of chapter eight, title four of the code of civil procedure, as applied to an action relating to real property, are subject to the qualification that the court may, in its discretion, proceed either as prescribed in that title, or in sections fifteen hundred and twenty-two and fifteen hundred and twenty-three. (Co. Civ. Proc. § 1521). Where upon the death of a party, different persons succeed to the decedent's title to, or interest in, different distinct parcels of the property, sought to be recovered, the court may upon motion, and upon such terms as justice requires, direct that the action be divided into as many different actions as are necessary; and that the successor to the title or interest of the decedent, to or in each distinct parcel, be substituted as

plaintiff or defendant, as the case requires, in the action relating thereto. (Co. Civ. Proc. § 1522). Where the plaintiff seeks to recover damages for withholding the property, and upon the death of a party, different persons succeed to the decedent's right to, or liability for, those damages, and to his title to, or interest in, the property, the court may upon motion made, upon notice to the persons to be affected, and upon such terms as justice requires, direct the action to be divided into two actions, one to recover the possession of the property, with the rents and profits thereof, accruing after the decedent's death; the other to recover the damages accruing before his death; and that the successor in interest of the decedent, with respect to the cause of action in each action, be substituted as plaintiff or defendant therein, as the case requires. (Co. Civ. Proc. § 1523). In case of the death of the plaintiff, the widow need not join as party plaintiff with his heirs. (*Ash v. Cook*, 3 Abb. Pr. 389). If, upon the death of one of two or more plaintiffs, or one of two or more defendants, in an action for partition, the interest of the decedent in the property passed to a person, not a party to the action, the latter may be made defendant, by the order of the court; and a supplemental summons may be issued, to bring him in accordingly. (Co. Civ. Proc. § 1588). In such an action, upon the death of the party plaintiff, an heir may procure himself to be substituted as to the real estate; and the executors, for the purpose of procuring an accounting of the rents received, when that has been asked for in the complaint. (*Hoffman v. Tredwell*, 6 Paige, 308). Where one defendant in an action of partition has died, without answer, or appearance in the action, and his heirs have not been substituted, all proceedings subsequently taken in the action, are void against the heirs (*Requa v. Holmes*, 16 N. Y. 193); and the heirs are not estopped from insisting upon its invalidity, because they have appeared on certain motions which were made after the sale of the premises. (S. C. 26 N. Y. 338). But where in such an action, certain of the defendants died, pending the action, and other parties

succeeded to their interests, the judgment was held good as to all the interests. (*Waring v. Waring*, 7 Abb. Pr. 472).

ARTICLE IV.

HOW NEW PARTIES BROUGHT IN.

Where a sole party dies, the application to revive for or against his representatives, must be by motion. (Co. Civ. Proc. § 757). Notice of the motion must be given to the adverse party. (*McLoughlin v. Mayor, etc.*; 8 Daly, 474). If the application is by an assignee of the cause of action, he must give notice to the opposite parties, and to the executors of the party whom he claims to represent. (*Howard v. Taylor*, 5 Duer, 604). If the application is made by a party, to bring in the representatives of a deceased party, notice of the motion must be given to the representatives whom it is sought to substitute. The motion should be made upon affidavits, showing the death of the party, and that the parties whom it is sought to substitute are the successors in interest. (*St. John v. Croel*, 10 How. Pr. 253). The motion papers should show the consent of the personal representative to be brought in if the papers do not show that such representative has knowledge of the application. (*Wilson v. Harter*, 57 App. Div. 484). And the title of the party asking to be substituted must be contested, if at all, on the motion. (*Smith v. Zalinski*, 26 Hun, 225; *affd.*, 94 N. Y. 519; *Warner v. Schweitzer*, 52 App. Div. 520). The pleadings should always be made a part of the motion papers, that the court may see from an inspection of them, that the cause of action is one which survives. A motion for a substitution is a proceeding in the action, and the affidavits must be entitled in it. (*Davis v. Richards*, 2 Law Bull. 97). On the motion, the court will not look into the merits of the action, and will only look at the pleading to see whether the cause of action is one in which the substitution is proper. (*Wing v. Ketcham*, 3 How. Pr. 385). No supplemental complaint is required, as was formerly the case under

the code of procedure; but the court may direct a supplemental summons and complaint to be served, if it sees fit. (Co. Civ. Proc. § 760). An application under section seven hundred and fifty-seven, can be made by either party, as we have seen. (Article I, Section 2, *supra*). Where there were several parties plaintiff or defendant, and one of them has died, and the cause of action continues to the survivors, the former practice was to file a suggestion of the death of the party, and then the action might proceed without further order; but the fact of the death might be controverted by the opposite party on the trial. (2 Rev. Stat., 386, et seq.). But this procedure has now been abrogated. It is not proper, however, to continue the action, in the name of the living and the dead parties. (*Holmes v. Honie*, 8 How. Pr. 383). The proper course for the party desiring to continue the action in the name of the survivors, is to move on notice to the other parties and upon proof of the death, and that the cause of action survives, for an order that the action be continued in the names of survivors, or against them. This seems to have been the practice in the court of chancery. (*Leggett v. Dubois*, 2 Paige, 211).

In a case specified in section seven hundred and fifty-six and the following sections, where a person applies in his own behalf, the court may direct that he be made a party, by amendment of the pleadings or otherwise, as the case requires. Where an application is made by the plaintiff, to bring in such a person as defendant, the court may direct that a supplemental summons issue, and that supplemental pleadings be made. Where an application is made by a defendant to bring in such a person, the court may, and where the protection of the applicant's rights requires it, must, permit the defendant to commence a cross action for that purpose. The cross action must be brought in the same court, unless the order otherwise specially directs. If it directs that the action be commenced in another court, the latter court, may by order at any time, after the cross action is commenced, remove to itself the original action, with like effect, as if it had been brought therein. Unless the

court otherwise directs, the original action, and the cross action must be tried, and judgment therein rendered, as if they were one action. (Co. Civ. Proc. § 760).

ARTICLE V.

WHEN COURT MAY ORDER ACTION ABATED.

At any time after the death of the plaintiff, or after the marriage of the plaintiff, where it affects the rights of either party, the court may, in its discretion, upon notice to such persons as it directs, and upon the application of the adverse party, or of a person whose interest is affected, direct that the action abate, unless it is continued by the proper parties, within a time specified in the order, not less than six months, nor more than one year, after the granting thereof. (Co. Civ. Proc. § 761).

ARTICLE VI.

EFFECT OF VERDICT, REPORT, OR DECISION.

SECTION.

1. Death of party after verdict, etc.
2. No verdict to be taken after party's death.

Sec. 1. Death of Party After Verdict, etc.

The original cause of action becomes merged in the judgment, so that, after rendition of judgment and before it is reversed, there is no question possible concerning the abatement of the cause of action upon which such judgment was recovered. (*Carr v. Rischer*, 119 N. Y. 117). Of course, if the judgment upon a cause of action that abates is reversed, there can be no new trial and none will be ordered, for the original cause of action then comes under consideration again, and, *ex hypothesi*, it has abated. (*Stringham v. Hilton*, 22 Abb. N. C. 281); but where the plaintiff has a judgment on a cause of action which abates, which is reversed by the intermediate appellate court, the defendant's death will not defeat the consideration of the case by the court of

appeals, the controversy there being over the judgment, and not over the original wrong. (*Carr v. Rischer, supra*). If either of the parties to an action dies, after an accepted offer to allow judgment to be taken, or after a verdict, report, or decision, or an interlocutory judgment, but before final judgment is entered, the court must enter final judgment in the names of the original parties, unless the offer, verdict, report, or decision, or the interlocutory judgment is set aside. (Co. Civ. Proc. § 763). This section applies only to causes of action which survive. (*Robinson v. Govers*, 65 Hun, 562; 67 Hun, 317; 138 N. Y. 425). The report, referred to in this section, is the report of a referee who is appointed to hear and determine an action; and not a referee who is simply directed to compute the amount due, or to take testimony, and to report to the court for information. (*Smith v. Joyce*, 11 Civ. Proc. Rep. 257). The section does not include a case where judgment is taken by default. (*Grant v. Griswold*, 21 Hun, 509). A dismissal of the complaint is not a "verdict, report, or decision," within the meaning of this section. (*Lutz v. Third Ave. R. R. Co.*, 44 App. Div. 256). There is a flat disagreement of the only two authorities on the subject over the question, whether an interlocutory judgment, overruling a demurrer and granting leave to answer on payment of costs within a certain time, is within the meaning of this section; Surrogate Rollins held a final judgment, entered on such an interlocutory judgment by reason of the defendant's failure to answer within the given time which failure was caused by his death prior to the expiration of the time, to be a valid claim against the decedent's estate (*Matter of Clark*, 5 Dem. 377); on the other hand, Mr. Justice Lawrence vacated a final judgment entered under such circumstances. (*Simmons v. Vanderbilt*, N. Y. Daily Reg., Feb. 6, 1883). After verdict, report, or decision, in an action to recover damages for a personal injury, the action does not abate by the death of a party, but the subsequent proceedings are the same as in a case where the cause of action survives. (Co. Civ. Proc. § 764). If the judgment in the action mentioned in this section,

is reversed, a new trial will not be granted, but the complaint will be dismissed. (*Spooner v. Keeler*, 51 N. Y. 527). If a new trial has been ordered, and the plaintiff then dies, the action will abate. (*Kelsey v. Jewett*, 34 Hun, 11).

Sec. 2. No Verdict to be Taken After Party's Death.

Title four of chapter eight of the code of civil procedure, does not authorize the entry of a judgment against a party who dies before a verdict, report, or decision is actually rendered against him. In that case the verdict, report, or decision is absolutely void. (Co. Civ. Proc. § 765). If the party dies after trial, but before decision, no decision can be rendered until his representatives have been substituted in the action. (*N. Y. Cen. & H. R. R. Co. v. Pettit*, 2 McC. Civ. Proc. Rep. 149). So, if he dies after argument of a motion which does not involve the merits, but before decision, the motion cannot be decided until the substitution has been had. (*Reed v. Butler*, 11 Abb. Pr. 128). At common law, the whole period of the term or circuit was looked upon as a single day; and the rule that the death of either party after verdict should not be alleged for error, was applied to a case where the defendant had died on the first day of the term and before the trial, in fact, of the cause. (*Manchester v. Herrington*, 10 N. Y. 164, 169). But this rule has been abrogated by section seven hundred and sixty-five, which forbids the entry of judgment against a party, who dies before the verdict is actually rendered against him.

CHAPTER XXI.

DISCOVERY OF BOOKS AND PAPERS.

ARTICLE I...When ordered.

ARTICLE II..Petition and order.

ARTICLE I.

WHEN ORDERED.

SECTION.

1. What courts may make the order.
2. When granted.

Sec. 1. What Courts May Make the Order.

A court of record, other than a justices court in a city, has power to compel a party to an action pending therein, to produce and discover, or to give to the other party, an inspection and copy, or permission to take a copy, of a book, document, or other paper in his possession, or under his control, relating to the merits of the action, or of the defense therein. (Co. Civ. Proc. § 803).

Sec. 2. When Granted.

Subdivision 1.—RULES APPLICABLE TO ALL CASES.

An action cannot be maintained, to obtain a discovery under oath, in aid of the prosecution or defense of another action. (Co. Civ. Proc. § 1914). The provisions of the revised statutes, and of the code of procedure, upon the subject of discovery and inspection, have been repealed. Now, all applications for that purpose must be made in the action itself under section eight hundred and three, and the six following sections of the code of civil procedure. (*Cutter v. Pool*, 3 Abb. N. C.

130; *Dick v. Phillips*, 41 Hun, 603; *Bloodgood v. Slayback*, 62 App. Div. 315). It is to be noted that the application must be in a *pending* suit—it cannot be made before the action is begun. The object which is sought to be accomplished by discovery and inspection, cannot be obtained by an examination of a party before trial under section eight hundred and seventy-three of the code of civil procedure. (*Martin v. Spofford*, 3 Abb. N. C. 125). The two are different and distinct proceedings, and they may be pursued concurrently, or at different stages of the action. (*McGuffin v. Dinsmore*, 4 Abb. N. C. 241; *Lefferts v. Brampton*, 24 How. Pr. 257; *Lord v. Spielman*, 13 Misc. 48).

The general rules of practice must prescribe the cases, in which a discovery or inspection may be so compelled, and the proceedings for that purpose, where the same are not prescribed in the code. (Co. Civ. Proc. § 804).

The rules which the court has made, pursuant to this section, will be found stated in a subsequent subdivision. Those rules do not restrict the remedy, but they enlarge it. (*Stichter v. Tillinghast*, 43 Hun, 95; *Babbitt v. Crampton*, 1 Civ. Proc. Rep. 169). Whether discovery and inspection will be granted at any stage of the action, is, in all cases, discretionary with the court. (*Clyde v. Rogers*, 87 N. Y. 625; 94 N. Y. 541; *Finlay v. Chapman*, 119 N. Y. 404). It will only be granted in extreme cases, where a refusal will involve the loss of a claim or defense. (*Harbison v. Von Volkenburgh*, 5 Hun, 454). It must be made to appear that it is necessary, and not merely a precautionary measure. (*Campbell v. Hoge*, 2 Hun, 308). And it will only be granted in regard to matters as to which the party applying for it is entitled to relief. (*Gray v. Kendall*, 10 Abb. Pr. 343, note). The application for discovery or inspection will be denied for laches. (*Walmsley v. Nelson*, 3 Abb. N. C. 127; *Moran v. Vreeland*, 29 App. Div. 243). The remedy extends to all evidence of a documentary nature relating to the merits of an action, whether on the part of the prosecution or defense (*Townsend v. Lawrence*, 9 Wend. 458), such as letter press copies even. (*N. Y. Bank Note Co. v. Hamilton Bank Note, etc. Co.*, 5 App.

Div. 126) ; but it does not extend, of course, to anything but books and documents. (*Cooke v. Lalance Grojean Mfg. Co.*, 29 Hun, 641). Although Rule 14 in terms authorizes a party to compel his adversary not only of books and documents, but also of any "article or property," such provision is invalid, as the convention of justices had no power to make it. (*Luerbach v. D. L. & W. R. R. Co.*, 73 N. Y. Supp. 118). As to whether a terminal line tree, on which certain marks and symbols have been placed to tell the true line of a lot, is a "document" within the meaning of these sections of the code, *quaere*. (*Hayden v. Van Cortlandt*, 84 Hun, 150). The power to order an inspection of books and papers, includes the power to compel their deposit for purposes of inspection (*Pindar v. Seaman*, 33 Barb. 140; *Terry v. Rubel*, 12 N. Y. Leg. Obs. 138) ; but the better practice is not to order a deposit of the papers of which an inspection sought, but to direct that the party furnish sworn copies of entries relating to the subject in controversy, to be delivered to his opponent. (*Cram v. Moore*, 1 Sand. 662). An order for discovery will only be made to enable a party to obtain information which is necessary to establish his own case. (*Sanger v. Seymour*, 42 Hun, 641). Where the court has reason to believe, that the application is made to enable the party to learn the facts of his adversary's case, or to ascertain what evidence his adversary will produce upon the trial, or to disprove a fact which it is necessary that his adversary should prove upon the trial, the order will not be granted. (*Sanger v. Seymour*, *supra*; *Shoe and Leather Rep. Ass'n v. Bailey*, 49 Super. 385; *Douglas v. Delano*, 20 Wk. Dig. 85). Discovery should not be ordered of all of the books and papers of the opposite party, unless the necessity of a discovery of all is shown (*Phelps v. Platt*, 54 Barb. 557) ; and it is made to appear that they contain evidence relating to the merits of the action. (*Davis v. Dunham*, 13 How. Pr. 425). Before discovery will be granted to a party, it must appear that he has not in his possession any means of obtaining the information for which he asks. (*McAllister v. Pond*, 15 How. Pr. 299). If the information can be obtained by the ex-

amination of the party, or by the production of the books and papers upon the trial, the order for the discovery will be refused, unless some special reason is shown why it should be granted. (*Com. Bank of Albany v. Dunham*, 13 How. Pr. 541; *Low v. Graydon*, 14 Abb. Pr. 443; *Central Cross Town R. R. Co. v. Twenty-Third Street R. R. Co.*, 53 How. Pr. 45). Inspection and discovery of books and papers cannot be ordered, in connection with the examination of the party, under section eight hundred and seventy-three of the code (*Hauseman v. Sterling*, 61 Barb. 347; *Bloom v. Pond's Extract Co.*, 27 Abb. N. C. 366 and note; *Bloodgood v. Slayback*, 62 App. Div. 315); but in a proper case a witness may, under sections 872 and 873, be required to produce books and papers as an adjunct to his oral examination. (*Drake v. Weinman & Co.*, 12 Misc. 65; *Bloodgood v. Slayback*, *supra*), upon the service of a *subpoena duces tecum*. (*Horst v. Yuengling Brewing Co.*, 1 App. Div. 629; *Savage v. Neely*, 8 App. Div. 316). Discovery and inspection may be ordered of the books and papers of a corporation. (*Burden v. Burden*, 23 Wk. Dig. 289; *Frothingham v. Broadway, etc., R. R. Co.*, 9 Civ. Proc. Rep. 304; *Central Nat'l Bk. v. White*, 37 N. Y. Super. Ct. Rep. 297). When the order is made for the production of the books of a corporation, it will not be required to produce before a referee in New York state, books which are in actual use in an office of the company in a distant state; but the order will be, to deliver to the petitioner sworn copies of so much as relates to the matters in issue, at a time to be stated in the order. (*Ervin v. O. R. & N. Co.*, 22 Hun, 566). Discovery of the books of a corporation, however, cannot be ordered in an action to which the corporation is not a party. (*Morgan v. Morgan*, 16 Abb. Pr. N. S. 291). Nor can the directors of a corporation be required to produce its books; the order must be directed to the corporation itself. (*Boorman v. A. & P. R. R. Co.*, 78 N. Y. 599). The books of a receiver may be produced; but where an order is made for that purpose, the receiver will only be required to produce them at such times as will not interfere with the duties of his office, and only such books as are in

the judicial district where the application is made. (*Fowler's Petition*, 9 Abb. N. C. 268). In an action between partners for an accounting, if the books of the firm are in the possession of one of the partners, it will be almost as a matter of course to direct him to produce them, or to permit his adversary to inspect them. (*Veiller v. Oppenheim*, 75 Hun, 21, 25); but in an action to set aside the sale of partnership assets by one partner to the other, and to have the plaintiff's rights as a partner declared to be still subsisting, the plaintiff is not, before judgment, entitled, as a partner, to a general inspection of the books of the firm. (*Platt v. Platt*, 61 Barb. 52). Where a partner authorized his executors to continue the firm business, and they sold the testator's interest to the surviving partner, who subsequently took a partner and conducted the business under the new name; in an action by the son of the deceased partner, alleging a conspiracy between F. and the executors, in pursuance of which his father's interest in the firm was sold to F. at a sum far less than its value; discovery and inspection of the books of the new firm was permitted. (*Martine v. Albro*, 26 Hun, 559). Where an executor of a deceased partner had brought an action to settle the accounts of the estate, he was permitted to have a discovery of the partnership books. (*Livingston v. Curtis*, 12 Hun, 121). The right of a principal, to the discovery of the books and vouchers of his agent or *vice versa* rests on different and stronger grounds, than the right of a party to the inspection of the books of his adversary. (*Manley v. Bonnel*, 11 Abb. N. C. 123; *Veiller v. Oppenheim*, 75 Hun, 21, 25; S. C. 31 Abb. N. C. 181 and note). In an action by a principal against his brokers, for an accounting, the principal is entitled to consult the books of the latter, being kept in the course of the agency, as they contain the only reliable evidence of the transactions in the suit; and an order for their inspection was held to be proper. (*Duff v. Hutchinson*, 19 Wk. Dig. 20). A physician's account books, containing information which would be privileged to his patients, are held not subject to inspection in an action between the physician and a third person. (*Mott v.*

Consumers' Ice Co., 2 Abb. N. C. 143; affd. without op.; 52 How. Pr. 244). In an action to recover damages for personal injuries it was formerly held that the court had no power to order the plaintiff to submit his person to inspection (*Roberts v. O. & L. C. R. R. Co.*, 29 Hun, 154; *McQuigan v. D. L. & W. R. R. Co.*, 129 N. Y. 50); but the amendment of 1894 to section 873 of the code of civil procedure expressly gives such power. A grantor, in whose name ejectment was prosecuted by the grantee, is not a party who may be compelled to produce books under this section. (*Adrianse v. Sanders*, 11 Abb. N. C. 422). Where an order required that an officer of the defendant corporation should appear, and be examined concerning certain writings, and should produce such writings, and further required the corporation, and such officer individually, and in his official capacity, to produce and discover such writings, and give the plaintiff an inspection, or copy, or permission to copy the writings; it is substantially an order for discovery of documents, and must be applied for under this section of the code of civil procedure, upon petition and order to show cause. (*Levey v. N. Y. C. & H. R. R. Co.*, 53 Super. 263).

An order of discovery will not be made to enable a party to obtain information on which to base an examination of an expert witness (*Miner v. Gardiner*, 6 T. & C. 343); nor will it be made to enable a party to examine the books of his adversary, in order to disprove the evidence of the plaintiff as to the value of his services. (*Mott v. Consumers' Ice Co.*, 2 Abb. N. C. 143; affd. without op., 52 How. Pr. 244).

The discretionary power of the court in granting or refusing a discovery is reviewable by the appellate division (*Hart v. Ogdensburgh & Lake Champlain R. R. Co.*, 69 Hun, 497); but not by the court of appeals. (*Finlay v. Chapman*, 119 N. Y. 404).

Subdivision 2.—BEFORE ISSUE.

Applications may be made in the manner provided by law to compel the production and discovery or inspec-

tion with copy of books, papers and documents relating to the merits of any civil action pending in court or of any defense in such action, in the following cases :

1. By the plaintiff, to compel the discovery of books, papers or documents in the possession, or under the control, of the defendant, which may be necessary to enable the plaintiff to frame his complaint, or to answer any pleading of the defendant.

2. By the defendant, to compel the like discovery of books, papers or documents in the possession, or under the control, of the plaintiff, which may be necessary to enable the defendant to answer any pleading of the plaintiff. (General Rule 14).

An order for discovery before a cause is at issue, will only be granted when it is absolutely necessary to enable the party to draw his pleading. (*Ward v. N. Y. Life Ins. Co.*, 78 Hun, 363). Where it appears by the petition or otherwise, that he has information enough to enable him to frame the pleading, it will be denied; though the allegations of the pleading will have to be made upon information and belief, and not upon knowledge. (*Rafferty v. Williams*, 50 Super. 66; *Mchesy v. Kahn*, Id. 209; *Duff v. Hutchinson*, 5 Law Bull. 3; *Mora v. McCredy*, 2 Bosw. 669). A discovery may be denied when asked to frame the complaint, although it appears that it will be necessary for the plaintiff to have such discovery to prepare for trial. (*Stanton v. Friedman*, 47 App. Div. 621).

An order for discovery will not be granted before issue, to enable the plaintiff to ascertain the names of persons who should be made parties to the action (*Opdyke v. Marble*, 18 Abb. Pr. 266; 44 Barb. 64); nor to make more accurate the *ad damnum* clause in his complaint (*Taylor v. Am. Ribbon Co.*, 38 App. Div. 146; *Brummer v. Cohen*, 47 App. Div. 470); nor will it be granted to enable a party to serve a bill of particulars. (*McIlhanney v. Magie*, 12 Civ. Proc. Rep. 27). An order for discovery has been held proper in the following cases: to enable the plaintiff to frame his complaint in an action for injuries, where the petition shows that the defendants who appear, are jointly interested with

those who do not appear, under a contract in writing connected with the cause of the injuries, the joint liability under which, the appearing defendants deny (*Stilwell v. Priest*, 85 N. Y. 649); in an action by an administrator of a deceased partner, for the purposes of framing a complaint for an accounting of the partnership business, although there was a provision in the articles of partnership that the survivor should carry on the business until the expiration of the time limited for the existence of the partnership (*Newman v. Newman*, 20 Wk. Dig. 283); in an action by a plaintiff, who has a direct interest in the profits and losses of the defendant's business by reason of an agreement that he should have a certain percentage upon the profits in lieu of salary, to recover the amount due him under such agreement (*Veiller v. Oppenheim*, 75 Hun, 21); in an action for money received by the defendant, as plaintiff's agent (*Ruberry v. Binns*, 5 Bosw. 685); in an action upon the official bond of a tax collector, the court may direct the latter to deposit for the plaintiff's inspection, the assessment roll and warrant held by him, to enable the plaintiff to prepare the complaint (*Board of Education v. King*, 7 Civ. Proc. Rep. 64); in an action against a corporation. (*Frothingham v. Broadway, etc. R. R. Co.*, 9 Civ. Proc. Rep. 304). Such an order will not be granted where it appears that the object of the application was to make a fishing excursion, to find out whether there was a cause of action on which the plaintiff might make a complaint. (*Brownell v. Bank of Gloversville*, 20 Hun, 517). If the complaint has been made, the plaintiff will not ordinarily be entitled to an order for discovery and inspection, until after the cause is at issue (*Thompson v. Erie Ry. Co.*, 9 Abb. Pr. N. S. 230); but where the plaintiff has been required by order to amend his complaint and set forth certain details and he shows to the court that he cannot obey such order without an inspection, a discovery should be granted. (*Blumberg v. Lindeman*, 19 App. Div. 370). A discovery will not be granted to the defendant to enable him to answer where it appears that he can answer sufficiently to raise an issue. (*Earle v. Beman*,

1 App. Div. 136). A defendant has the same right to discovery to frame a counter-claim as the plaintiff has to frame a complaint. (*Albany Brass & Iron Co. v. Hoffman*, 12 Misc. 167; *affd.* on *op.* below, 86 Hun, 620). After the defendant has demurred, and the demurrer has been overruled and he has appealed from the order overruling the demurrer, an application for discovery to prepare for trial, will be premature, until the appeal has been decided. (*Palen v. Johnson*, 18 Abb. Pr. 304).

Subdivision 3.—AFTER ISSUE.

Either party may be compelled to make any discovery of book, document, record, article or property in his possession or under his control or in the possession of his agent or attorney, upon its appearing to the satisfaction of the court that such book, document, record, article or property is material to the decision of the action or special proceeding, or some motion or application therein, or is competent evidence in the case, or an inspection thereof is necessary to enable a party to prepare for trial. (General Rule 14). An order for the discovery and inspection of books and documents, may be granted to enable the applicant to prepare for trial. (*Stichter v. Tillinghast*, 43 Hun, 95). But where an application is made for this purpose, the rule applies that the applicant will only be entitled to the order, to enable him to prove his own case, and not to enable him to investigate the case of his adversary. It is necessary that the same facts should appear whether the application is made before issue to enable the party to frame his pleading, or after issue, to enable him to prepare for trial. It has been sometimes stated that a different rule obtains in the two cases; and it was held in the case of *March v. Davison* (9 Paige, 580), that to sustain a mere bill of discovery in aid of a defense at law, it was only necessary to show that the discovery is material to the defense, and not that it is absolutely necessary; but if this ever was the rule, with regard to an application under the code of civil procedure, it is not now. The cases now hold unanimously that after issue, to enable a party to procure an inspection and discovery

that he may prepare for trial, he must in all cases, allege that such discovery is absolutely necessary. (*Campbell v. Hoge*, 2 Hun, 308; *Harbison v. Von Volkenburgh*, 5 Hun, 454; *Walmsley v. Nelson*, 3 Abb. N. C. 127). Where it does appear that the evidence sought is the only evidence which can be produced by the party seeking the discovery to enable such party to prove an essential part of his case, the discovery will be granted. (*Cont. Nat. Bk. v. Myerle*, 29 App. Div. 282). Wherever the object of the discovery can be attained by the examination of a party, or by a subpoena *duces tecum*, the petition will not be granted. (*Dalzell v. Fahys Watch Case Co.*, 5 Misc. 493; app. dismissed, 141 N. Y. 570). Where a principal had brought an action against his agent for an accounting, he was held entitled to consult the books of the agent, for the purpose of enabling him to prepare for trial, where he made it appear that a subpoena *duces tecum* would not give him a sufficient opportunity to examine the books; and the fact that the discovery might establish misconduct on the part of the defendants, and might tend to convict them of a crime, was held to be no answer to the application. (*Duff v. Hutchinson*, 19 Wk. Dig. 20). Where the issue was whether or not the contracts sued on were forged, the defendant was held to be entitled to an inspection and an opportunity to take photographic copies (*Cornell v. Woolsey*, 7 Wk. Dig. 555); although the plaintiff denied having the contracts in his possession; but did not say where they were, or explain how they had passed out of his control. (*Hepburn v. Archer*, 20 Hun, 535). Where the plaintiff notices a motion for discovery to prepare for trial after issue joined, and, after the service of the notice of motion, an amended complaint is served, the motion should be denied with leave to renew after the amended issue has been joined. (*Fleet v. Cronin*, 5 App. Div. 48). A motion by one defendant, to compel another defendant to produce documents, to establish a cause of action set up in his answer against such other defendant, is not allowable, if the cause of action is new and independent of the complaint. (*Rafferty v. Palmer*, 34 Hun, 544).

ARTICLE II.

PETITION AND ORDER.

SECTION.

1. What petition shall contain.
2. Order to show cause.
3. Order for discovery, what to contain.
4. When order may be vacated.
5. Proceedings on the return of the order.
6. Proceedings under the order.
7. Effect of papers, etc., produced.
8. Penalty for disobedience.

Sec. 1. What Petition Shall Contain.

To entitle a party to procure such a discovery or inspection, he must present a petition, praying therefor, and verified by affidavit, to the court, or to a judge authorized to make an order in the action. (Co. Civ. Proc. § 805). The application must be made by petition. (*Cutter v. Pool*, 3 Abb. N. C. 130; *Lerey v. N. Y. C. & H. R. R. Co.*, 53 Super. 263). It was held, under the code of procedure, that the application would not be denied because it was made by motion, and not by petition (*Johnson v. Con. Silver Min. Co.*, 2 Abb. Pr. N. S. 413); but that case does not apply under the code of civil procedure, which expressly requires that, to obtain a discovery, the party must present a petition. (*Dick v. Phillips*, 41 Hun, 603; *John S. Way Mfg. Co. v. Corn*, 66 How. Pr. 152). The moving papers, upon the application for such discovery or inspection shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit, stating that the books, papers, articles, property and documents, whereof discovery or inspection is sought are not in the possession, nor under the control, of the party applying therefor, but are in the possession or under the control of the party against whom discovery is sought or his agent or attorney. The party applying shall show to the satisfaction of the court or judge the materiality and necessity of the discovery or inspection sought, the particular information which he requires, and in the

case of books and papers, that there are entries therein as to the matter of which he seeks a discovery or inspection. (General Rule 15). The facts and circumstances required to be stated by this rule, are such as show the necessity for discovery, and that the evidence or information sought cannot be obtained from any other source; and that a subpoena *duces tecum* or an examination of the party, will not answer the purpose. (*Holtz v. Schmidt*, 34 Super. 28; *Thompson v. Erie Ry. Co.*, (No. 1), 9 Abb. Pr. N. S. 212; *Hauseman v. Sterling*, 61 Barb. 347). While it may not be necessary, to aver that the discovery sought is indispensibly necessary, and that the applicant has no means of establishing the same facts by other available proof (*Whitworth v. Erie R. R. Co.*, 37 Super. 437); yet these facts must appear when the propriety of the discovery is drawn in question by opposing affidavits; and it is, for that reason, much safer that they should plainly appear by the moving papers. It should also be made to appear that the books or papers sought for, not merely may, but probably do, contain the information desired (*New England Iron Co. v. N. Y. Loan & Imp. Co.*, 55 How. Pr. 351); and that fact must be stated positively, or, if it is stated on information and belief, the petitioner must give the sources and grounds of such information and belief, that the court can see that the grounds for the belief are reasonable. (*Walker v. Granite Bank*, 19 Abb. Pr. 111; 44 Barb. 39; *Husson v. Fox*, 15 Abb. Pr. 464). Facts and circumstances must be stated sufficient to satisfy the court that the books and papers sought to be examined do, in fact, contain material evidence for the party, and it is not enough that the party believes, or is advised, that material evidence will be found. (*Walsh v. Press Co.*, 48 App. Div. 333; *Keilty v. Traynor*, 31 App. Div. 115). Absolute proof of the facts stated in the petition is not necessary; but there should be sufficient to raise the presumption; and that presumption will be enough to warrant the granting of the order (*Union Paper Collar Co. v. Metropolitan Collar Co.*, 3 Daly, 171; *Whitworth v. Erie R. R. Co.*, 37 Super.

437); especially if it is not denied. (*Lefferts v. Brampton*, 24 How. Pr. 257). A sufficient description of the books and papers of which discovery or inspection are sought, should be given, so that the party who is called on to produce them may know just what is required (*Low v. Graydon*, 14 Abb. Pr. 443); and so that the court can see that the books and papers sought for, are competent evidence. (*Speyers v. Torstritch*, 5 Robt. 606; *Strong v. Strong*, 3 Robt. 675). A mere statement that they contain evidence, or that the applicant is advised by counsel and believes that they are evidence, cannot be substituted for the facts and circumstances, on which the court can form its own judgment. (*Strong v. Strong*, 3 Robt. 675; *Merguelle v. Continental Bank Note Co.*, 7 Robt. 77). The motion will not be granted where the entries sought are not shown to be evidence, but only information by means of which evidence can be obtained. (*Woods v. De-Figaniere*, 1 Robt. 681). The petition must state precisely what information is desired. (General Rule 15; *Julio v. Ingalls*, 17 Abb. Pr. 448, note; *Walker v. Granite Bank*, 19 Abb. Pr. 111; 44 Barb. 39). Facts must be stated to enable the court to see that the evidence is material; a mere allegation of materiality is not sufficient; it must also be stated positively, that the books and papers are not in the possession or under the control of the applicant. (General Rule 15; *Jackling v. Edmonds*, 3 E. D. Smith, 539). A demand for the inspection and refusal is not necessary to be shown. (*Albany Brass & Iron Co. v. Hoffman*, 12 Misc. 167; affd. on op. below, 86 Hun, 620). It is well in the petition to state the advice of counsel, and belief, that the discovery is necessary to enable the party to plead and to prepare for trial (*Jackling v. Edmonds*, *supra*); but that statement is not necessary, and it will not obviate the necessity of stating facts from which the court can judge. The petition must be verified by the party; or some reason should be stated why it is made by the attorney. (*Phelps v. Platt*, 54 Barb. 557). The statement that the party does not reside in the city and county where the attorney resides is not sufficient;

something must be shown to demonstrate the impossibility of getting the affidavit of the client. (*Fromme v. Lisner*, 63 Hun, 290). Where an application is made pending a trial before a referee, his certificate that the production of the papers was necessary is presumptively sufficient to warrant the making of the order, where the action is for an accounting. (*Frazer v. Phelps*, 3 Sand. 741).

Sec. 2. Order to Show Cause.

Upon the petition, an order may be made directing the party against whom the discovery or inspection is sought, to allow it, or in default thereof, to show cause before the court, at a time and place, and upon a notice, therein specified, why the prayer of the petition should not be granted; and, if necessary or proper, that his proceedings be stayed until the hearing of the application, although the stay exceeds twenty days. (Co. Civ. Proc. § 805). The order to show cause is in all cases required, and a peremptory order for discovery cannot be made in the first instance *ex parte*. (*Dick v. Phillips*, 41 Hun, 603). The proceeding is an ordinary proceeding in the action, and the order to show cause should be served on the attorney for the party. (*Rossner v. N. Y. Museum Ass'n*, 20 Hun, 182; *Union Trust Co. v. Driggs*, 49 App. Div. 406). If it is served only on the party, it will be set aside on motion. (*Schmidt v. Selinger*, 1 Law Bull. 61).

Sec. 3. Order for Discovery, What to Contain.

The order for granting the application, shall specify the mode in which the discovery or inspection is to be made, which may be either by requiring the party to deliver sworn copies of the matters to be discovered, or to allow an inspection with copy, or by requiring him to produce and deposit the same with the clerk, unless otherwise directed in the order. The order shall also specify the time within which the discovery or inspection is to be made; and when papers, articles or property are required to be deposited, the order shall specify the time the deposit or the opportunity for inspection

shall continue. (General Rule 16). As section eight hundred and five requires that the order shall be made in the alternative, that the party shall either allow the discovery or inspection, or show cause, it is well that the alternative order should contain full instructions as prescribed by rule sixteen. The order should comply strictly with the rule, and should particularly specify what books, papers or documents are to be produced, so that the party to whom it is directed, may know precisely what is required; if it is too broad, it will either be vacated or reversed on appeal (*Walker v. Granite Bank*, 44 Barb. 39); or it will be modified on motion, so as to require the production only of such documents as are proper. (*Clyde v. Rogers*, 24 Hun, 145). The order requiring the production of all the account books of a party, or of certain books and "all other books of defendant's, containing any entries showing," etc., is too broad. (*Julio v. Ingalls*, 19 Abb. Pr. 448, note; *Walker v. Granite Bank*, *supra*). If the order sufficiently specifies the books or documents to be produced, too great a generality in the application is cured. (*Hoffman v. Seixas*, 12 Misc. 3). The court or judge may direct that the order directing the discovery or inspection shall operate as a stay of all other proceedings in the cause, either in whole or in part, until such order shall have been complied with or vacated. (General Rule 16).

Sec. 4. When Order May be Vacated.

An order made as prescribed in section eight hundred and five, may be vacated by the judge who granted it, or by the court, upon satisfactory proof, by affidavit:

1. That it ought not to have been granted, or that it has been complied with; or,

2. That the party required to make the discovery, or permit the inspection, has not the possession or control of the book, document or other paper, directed to be produced or inspected. (Co. Civ. Proc. § 806). As the grounds stated in this section, why an order may be vacated, may also be available to a party upon

the return of the order to show cause, the authorities upon that subject will be referred to in the next section.

Sec. 5. Proceedings on Return of the Order.

Upon the return of an order to show cause, the court may make such an order, with respect to the discovery or inspection prayed for, as justice requires. (Co. Civ. Proc. § 807). If the application is opposed, upon the return of the order to show cause, the proceedings to be had are the same as upon any other contested motion. The order will not be refused, because the opposing party denies the materiality of the documents sought (*Clyde v. Rogers*, 24 Hun, 145; app. dismissed, 87 N. Y. 625); nor because he swears that the books contain no entry relevant to the matters in controversy. Upon those subjects the facts must be stated, and the court will form its own judgment. (*Elder v. Bogardus*, 1 Edm. Sel. Cas. 110). But where the opposing affidavit stated positively that a copy of the account already served contained all the items in the books (*Higgins v. Bishop*, 12 N. Y. Leg. Obs. 127); or where it appears that the defendant had offered to produce, and permit the plaintiff to examine, all the books which he would have been entitled to examine (*Walmsley v. Nelson*, 3 Abb. N. C. 127); discovery will not be granted. Where, in the opposing affidavits, it was stated as a reason why the order should not be granted, that the books contained false and deceptive entries, the order was still granted, and the party was required to produce the papers. (*Central National Bank v. White*, 37 Super. 297). Proof by the defendant that he has not the possession or control of the books sought, is a full answer to the application, and the order must be vacated or denied on the hearing (Co. Civ. Proc. § 806; *Ahoyke v. Wolcott*, 4 Abb. Pr. 41; *Bradstreet v. Bailey*, 4 Abb. Pr. 233); although he may omit to deny an allegation, in the moving papers, that he has given them to his attorney (*Woods v. DeFiganiere*, 1 Robt. 681); or although he admits that a third person gave them to the attorney who now has them. (*Douglas v. Delano*, 20 Wk. Dig.

85). But a bare denial of the possession of the papers, on which the party has brought a suit without any explanation or further statement of the facts, is not sufficient to require the court to vacate the order, or to deny the application (*Hepburn v. Archer*, 20 Hun, 535; *McCreery v. Ghormley*, 6 App. Div. 170); nor will an affidavit that the party has not possession of the books, be sufficient, if it is evasive, in showing how he parted with the possession of them. (*Hicks v. Charlick*, 10 Abb. Pr. 129; *Holly Mfg. Co. v. Venner*, 86 Hun, 42). A fixed sum, not exceeding twenty dollars, may be added to the costs of the motion for the fees of the referee. (Co. Civ. Proc. § 807).

Sec. 6. Proceedings Under the Order.

Where a discovery or inspection is directed, a referee may be appointed by the order, to direct and superintend it; whose certificate, unless set aside by the court, is presumptive, and except, in proceedings for contempt, conclusive, evidence of compliance or non-compliance with the terms of the order. (Co. Civ. Proc. § 807). The books or papers, specified in the order, should be produced precisely as required by the order, which should be strictly complied with, in every respect. (*Snyder v. Olmsted*, 1 How. Pr. 194). If the order is indefinite, as to produce all books, etc., containing entries on such and such a subject, or a similar order; or if the order specifies certain books and papers, and the party is not able to produce them all, he should present, with the books and papers which are produced, an affidavit that the books and papers which he does produce, are all that are mentioned in the order, or he should state a reason why the others cannot be furnished. One who is required to produce books, may seal up such parts as do not relate to the subject of the examination; and those who wilfully pry into the sealed parts, are guilty of contempt. (*Dias v. Merle*, 2 Paige, 494). If a referee has been appointed under section eight hundred and seven, the party ordered to make discovery, may be examined on oath before the referee, to such extent as the referee thinks proper, as to whether the order of

the court has been complied with. (*Hart v. Ten Eyck*, 2 Johns. Ch. 513; *Hallett v. Hallett*, 2 Paige, 432). If the adverse party claims that other books should be produced, or that the sealed portions of those which are produced, should be opened, he should apply in the first instance to the referee to require it to be done; who may permit such examination under oath as he deems proper; if upon such application, the referee requires it, and then the party producing the books, refuses to comply, an application should be made to the court, on the certificate of the referee; and the court will order it on that certificate. (Co. Civ. Proc. § 807; *Titus v. Cortelyou*, 1 Barb. 444). If no referee has been appointed, and the petitioner claims that the discovery is insufficient, and the order has not been complied with, he should apply to the court on motion, or by order to show cause, why the omissions should not be supplied. The motion papers should show what books were presented, under the order for discovery, and what omissions, or defects, or failures to comply with the order, there are claimed to be. (*Hoyt v. American Exchange Bank*, 1 Duer, 652). The court upon such an application may order a further discovery. (*Id.*). A party who has made a discovery, may withdraw the books or papers, after they have remained such time as the court has prescribed. (*Stow v. Betts*, 7 Wend. 536).

Sec. 7. Effect of Papers, etc., Produced.

A book, document or other paper, produced under an order, made as prescribed in this article, has the same effect, when used by the party requiring it, as if it was produced upon notice, according to the practice of the court. (Co. Civ. Proc. § 809).

Sec. 8. Penalty for Disobedience.

Where an order, made as prescribed in section eight hundred and seven, directs a discovery or inspection, the party in whose behalf it was made, may, upon proof, by affidavit, that the adverse party has failed to obey it, and upon notice to him, apply to the court, for an order

to punish him for the failure. Upon the hearing of the application, the court may, upon the payment of such a sum, for the expenses of the applicant as the court fixes, and upon compliance with such other terms as it deems just to impose, permit the party in default to comply with the order for a discovery and inspection; and, for that purpose, it may direct that the application to punish him stand over to a future time. Upon the final hearing of the application to punish the party in default, the court, in a proper case, may direct that his complaint be dismissed, or his answer, or reply be stricken out, and that judgment be rendered accordingly; or it may make an order, striking out one or more causes of action, defenses, counter-claims, or replies, interposed by him; or that he be debarred from maintaining a particular claim or defense, in relation to which the discovery or inspection was sought. Where the party has failed to obey an order, allowing an inspection by the adverse party, and requiring him to furnish a copy or permit a copy to be taken, the court may also direct that the book, document, or other paper, be excluded from being given in evidence; or it may punish the party for a contempt or both. (Co. Civ. Proc. § 808). Service, upon the attorney for the adverse party, of the order requiring discovery is sufficient as a basis for an order of punishment under this section. (*Rossner v. N. Y. Museum Asscn.* 20 Hun, 182).

INDEX.

A.

ABATEMENT OF ACTION OR SPECIAL PROCEEDING:	PAGE
none, if cause of action or right to relief survives.....	807
test whether cause of action survives.....	808
for wrongs to property rights and interests.....	808
what actions do not abate.....	809
what actions do abate.....	812
on death of party jointly liable.....	811
none, by marriage.....	812
if party imprisoned in State prison.....	813
against corporation, by dissolution of.....	809, 824
when court may order action abated.....	829
none after verdict, etc.....	829
when action for personal injury does not abate.....	830
ACCOUNT:	
limitation of action on.....	111
how alleged in pleading.....	326, 351
copy of, <i>see</i> BILL OF ITEMS.	
ACKNOWLEDGMENT:	
taking, not judicial act.....	14
what prevents running of statute of limitations.....	90
what sufficient to prevent running of statute.....	114
when must be in writing to prevent running of statute.....	114
by whom may be made.....	115
amendment, of	787
ACTION:	
may be tried elsewhere than at court house, upon stipulation..	9
pending in Supreme Court, when triable at chambers.....	9
may be noticed for trial at adjourned terms.....	11
when Supreme Court may remove to itself.....	67
defined	80
forms of, abolished.....	80
limitation of, <i>see</i> LIMITATION OF ACTION.	
to compel a determination of claim to real property who may	
be parties to	178
parties to, <i>see</i> PARTIES:	
commenced by service of summons.....	189

ACTION— (<i>Continued</i>):	PAGE
when jurisdiction acquired in.....	189
of replevin, when jurisdiction acquired in.....	190
when judgment in, may be taken without application to court..	193
on bond or undertaking, before whom brought.....	304
consolidation of, <i>see</i> CONSOLIDATION OF ACTIONS.	
when court may direct that one action abide event of another..	307
dismissal for neglect, <i>see</i> DISMISSAL.	
how far barred by counterclaim in previous action.....	455
in what, order of arrest granted, <i>see</i> ARREST and BAIL.	
when prosecution of, will be restrained by injunction.....	558
on undertaking, given on obtaining injunction.....	605
to foreclose mechanic's lien, receiver in.....	705
severance of, when part of claim admitted.....	764
abatement of, <i>see</i> ABATEMENT OF ACTION.	
continuance of, <i>see</i> CONTINUANCE OF ACTION.	
substitution of party in, on transfer of interest.....	822
ADJOURNMENT:	
of courts of record.....	4, 11
in absence of judge.....	11, 12
ADMINISTRATOR:	
temporary, when may sue and be sued.....	150
<i>See</i> EXECUTORS AND ADMINISTRATORS.	
ADMISSION:	
of service of papers	290
of service of summons, <i>see</i> SUMMONS.	
what deemed admitted in construction of pleading.....	349
in pleading, how construed.....	350
in pleading, cannot be controverted.....	350
ADVERSE POSSESSION. <i>See</i> LIMITATION OF ACTION.	
AFFIDAVIT:	
clerk may take.....	19
of service of summons, what must appear in.....	212
for substituted service of summons, what must show.....	215
for service of summons by publication, what must appear in...	219
how to be entitled.....	252
venue must be stated in.....	252
name of deponent must be stated in.....	253
when more than one deponent.....	253
facts only, to be stated in.....	253
doctrine absolute statements in, not on personal knowledge...	254
certain words necessary in.....	255
should be divided in paragraphs.....	254
must be signed by deponent.....	254
must be sworn to.....	255
what necessary in jurat.....	255
statement of no previous application in, when necessary.....	256

AFFIDAVIT—(Continued):	PAGE
requisites of, on application to extended time.....	258, 293
before whom taken, within the state.....	258
before whom taken, without the state.....	259
how authenticated	259
when authentication sufficient.....	259
replying and opposing	263
<i>See, also, DEPOSITION.</i>	
to obtain order to show cause.....	265
of service of papers, other than summons.....	289
when to be filed.....	291
for extension of time, must be served with order.....	295
requisites of, by surety on bond or undertaking.....	299
for bill of particulars, what should state.....	356
on procuring order of arrest.....	505
on procuring warrant of attachment.....	630
amendment of	787
AFFIDAVIT OF MERITS:	
when necessary	256
by whom made	256
what to be stated in.....	256
not required on motion to vacate for irregularity.....	803
AFFINITY OF JUDGE:	
when disqualifies	12-14
<i>See JUDGE.</i>	
AGENT:	
limitation of action by principal, for neglect of.....	112
must sue in name of principal.....	143
when may sue in his own name.....	143
when verification of pleading may be made by.....	340
AMENDMENT:	
of summons	193
of notice of pendency of action.....	242
of notice of appeal, when not allowed.....	297
of defective undertaking, when allowed.....	303
of pleading, when may be made of course.....	361
new causes of action may be set up by.....	361
what may be made of course.....	361
when must be made within twenty days.....	362
right to amend, how waived.....	362
what is amendment of course.....	362
effect of	363
amended pleading must be served.....	363
by leave of court before trial.....	364
what will be allowed.....	364
when application must be made for.....	367
reason for, must be shown.....	367

AMENDMENT—(Continued) :	PAGE
application for, must be upon notice.....	367
copy proposed pleading must be served.....	367, 794
order for, what should provide.....	367
at trial, who may grant.....	368
rules for.....	368
what will be allowed at trial.....	369
what is material variance.....	370
granting of application for, discretionary.....	371
terms of allowing.....	371
of pleading after trial, when allowed.....	371
may be made by appellate court.....	371
what will be allowed.....	371
after demurrer, <i>see</i> DEMURRER.	
of technical defects on motion to vacate attachment.....	682
of offer of compromise.....	771
what may be amended.....	776
void proceedings cannot be amended.....	777
excuse must be shown on application for.....	778
delay, ground for refusing.....	778
no distinction in granting, between kinds of action.....	778
when allowed on motion to vacate proceedings for irregularity..	779
of summons.....	779
of process other than summons.....	781
of judgment roll, on offer of compromise.....	783
of statement, on confession of judgment.....	783
of judgment.....	784
of judgment after appeal.....	786
of acknowledgments.....	787
of affidavits.....	787
of warrant of attachment.....	788
of bonds and undertakings.....	788
of cases.....	790
of commission to take testimony.....	791
of notice of appeal.....	777, 791
of orders.....	791
of petitions.....	792
of remittiturs.....	792
of returns.....	792
of sheriff's certificates and deeds.....	792
of verdicts.....	793
application for, to whom, and when made.....	794
terms of granting.....	794
what may be made by court only.....	794
mode of making.....	794
effect of.....	795

ANSWER:

	PAGE
of title, within what time made.....	83
defense of statute of limitations, must be set up in.....	117
when must be served	235
amendment of, <i>see</i> AMENDMENT.	
sham, may be stricken out.....	381
part of defense cannot be stricken out as sham.....	382
general denial in, cannot be stricken out as sham.....	382
what is sham defense in.....	382
falsity may be shown.....	383
when may be stricken out as sham.....	383
when required	425
no particular form of, necessary.....	426
what must contain	426
what may be denied.....	427
denial in, should be direct.....	427
general denial, what is.....	428
what may be proved under.....	432
denial on information and belief, when good in.....	429
specific denial, what is.....	430
how parts of complaint denied, should be referred to in.....	430
denials, "except as admitted," etc., when good.....	430
when allegations in, are not a denial.....	432
new matter in, what is.....	434
may be pleaded either for complete or partial defense....	434
when defense of, deemed controverted by plaintiff.....	349
defendant may interpose all defenses in one.....	436
defenses may be inconsistent in.....	436
when defendant will be required to elect.....	437
any defenses existing at time of, may be pleaded in.....	437
partial defenses may be pleaded in.....	437
what is partial defense.....	438
matters in mitigation of damages must be pleaded in.....	438
how such matters to be pleaded.....	439
when not regarded as counterclaim.....	454
what relief must be demanded in.....	456
when demurrer may be joined with.....	467
when objection to complaint must be taken by.....	481
when objection waived by.....	481
judgment for plaintiff, when part of claim admitted by.....	764
when discovery granted to enable party to frame.....	837
<i>See</i> COUNTERCLAIM—DEMURRER—SATISFACTION—DISCOVERY OF	
BOOKS AND PAPERS.	

APPEAL:

from order, time for, how limited.....	279
time to take, cannot be extended.....	297

APPEAL—(Continued):	PAGE
how extended by death of party.....	297
amendment of notice of.....	778, 791
irregularity cannot be corrected by.....	801
APPEARANCE:	
when defendant may appear.....	230
within what time, must be made.....	230
how made	230
what constitutes general.....	230
equivalent to personal service of summons.....	231
gives jurisdiction of person.....	231
does not give jurisdiction of subject matter.....	232
when entitles defendant to notice of subsequent proceedings...	232
what waived by	233
by attorney, good	232
what constitutes special.....	234
effect of special	234
what irregularity waived by general.....	804
APPELLATE DIVISION. See SUPREME COURT.	
ARBITRATION:	
when time to sue extended by.....	109
ARREST:	
attorney privileged from	38
time of defendant to answer after.....	236
who may be arrested	498
who are privileged from.....	498, 504
<i>See, also, ARREST AND BAIL.</i>	
ARREST AND BAIL:	
where right to arrest depends upon nature of action.....	482
in action for fine or penalty.....	484
in action for personal injury, what included in.....	484
in action for separation.....	485
in action for injury to property.....	486
what are such actions	486
not granted in action for money lost at play.....	487
not granted where property converted and tort waived....	487
when not granted for breach of promise.....	487
for misconduct or neglect in office.....	487
against attorney for money collected.....	488
in action for money received in fiduciary capacity....	488, 490
in action for damage for fraud or deceit.....	488
in action to recover chattel, fraudulently disposed of.....	489
in action for conversion of public property.....	492
in action on contract for fraud in incurring liability....	495
only granted when authorized by statute.....	483
when should not be granted.....	483

ARREST AND BAIL—(Continued) :	PAGE
where right depends partly upon extrinsic facts.....	495
substituted for writ of <i>ne exeat</i>	496
against whom it will be granted.....	496
for what purpose order will be granted.....	496
privilege from arrest	498
who may be arrested.....	498
when woman can be arrested.....	499
incompetent person, when to be discharged.....	499
when infant cannot be.....	499
one sued in representative capacity, when cannot be.....	500
members of congress, when.....	501
persons in public service.....	501
members of legislature	501
officers of legislature	501
superintendent of public works, etc.....	501
militia	501
soldiers of United States.....	501
foreign ministers	502
witnesses	502
parties to actions, when.....	503
police officers	503
officers of court	503
prisoner in arrest	503
one brought within jurisdiction by fraud.....	504
how discharged by reason of.....	519
privilege, how waived.....	504
papers necessary to obtain.....	496, 505
only to be granted on affidavit.....	505
when affidavit upon information and belief sufficient.....	507
how facts must be stated in affidavit for.....	507
papers must be filed.....	524
undertaking to be given in.....	509
when required	509
when may be dispensed with.....	511
order for, by whom granted	511
when granted only by court.....	512
when county judge may grant.....	513
when may be granted	512
contents of order	514
may fix time within which defendant must be arrested....	514
must state grounds on which granted.....	514
must be subscribed by attorney.....	514
how vacated or modified.....	515
when application must be made to.....	515
must be vacated, if no cause of action, in complaint....	517, 519
when made on papers on which order was granted.....	517
when founded upon proof by affidavit.....	518

ARREST AND BAIL—(Continued):	PAGE
when notice required	518
county judge may hear motion for, on notice.....	520
rules of decision, on motion.....	518
when motion to, may be joined with motion to reduce bail..	520
to whom application must be made.....	520
when court may require stipulation not to sue.....	521
how arrest made	524
must be made within county.....	524
where time fixed for, cannot be arrested afterwards.....	524
what papers must be served upon arrest.....	524
bail, how given	525
sureties may be required to justify on.....	527
proceedings upon justification of sureties.....	527
where justification may be made.....	527
qualification of sureties on.....	528
deposit may be made instead of bail.....	529
deposit to be paid into court by sheriff.....	529
money deposited, how disposed of.....	530
when defendant entitled to discharge for delay of plaintiff....	521
liability of sheriff after arrest of defendant.....	531
rights and privileges of sheriff, when liable.....	531
when bail may surrender defendant.....	532
how surrender to be made by bail.....	533
how surrender to be made by defendant.....	534
liability of bail, on failure to justify.....	534
bail can only be proceeded against by action.....	535
when such action may be brought against bail.....	535
what defenses may be interposed in action against bail.....	536
how discharged before expiration of time to answer.....	537
exoneration of, after action commenced.....	537
may be permitted to defend original action.....	537
<i>See, also, PROVISIONAL REMEDIES.</i>	
ASSESSMENT:	
will not be restrained by injunction.....	572
ASSIGNEE:	
when counterclaim allowed against.....	449
when substituted as plaintiff in place of assignor.....	823
ATTACHMENT:	
notice of pendency must be filed, after warrant of.....	239
cancellation of notice of pendency.....	243
when and by whom it may be granted.....	612
who may sue out	612
when non-resident may obtain.....	613
in what actions granted.....	613
in what actions cannot be granted.....	617
cause of action must exist at time of application for.....	613

ATTACHMENT—(Continued) :

	PAGE
distinction between, under code, and under revised statutes....	614
only granted in cases authorized by statute.....	614
granting of, discretionary with court.....	615
may be granted in action for unliquidated damages.....	615
against non-resident	618
what constitutes non-residence.....	618
when granted against foreign administrator.....	618
not granted against foreign receiver.....	618
not granted against resident member of non-resident firm.....	618
granted against foreign corporation.....	619
not granted against national bank.....	619
against absconding or concealing debtors.....	619
against one removing, assigning, or secreting property.....	621
property removed must be that of defendant.....	621
threatening to make preferential assignment, whether ground of	622
agreement to give preference, not ground of.....	622
assignment, fraudulent in law, not sufficient ground for.....	622
not necessary that defendant should dispose of all of his prop-	
erty to entitle plaintiff to	623
against one making false statement as to financial responsi-	
bility	623
against resident absent from state, etc.....	624
against public officer	625
may be granted to accompany summons.....	625
jurisdiction lost if summons not served in thirty days.....	626
when jurisdiction acquired by general appearance.....	627
service upon all partners necessary to retain jurisdiction.....	627
service by publication, what sufficient.....	627
what jurisdiction retained, without actual service.....	627
substituted service, held not sufficient.....	628
by whom warrant granted.....	629
papers on which granted.....	630
application must be founded upon affidavit.....	631
what must be shown by affidavit.....	630
by whom affidavit may be made.....	631
cause of action, how stated in affidavit for.....	634
when affidavit on information and belief sufficient.....	631
when allegations on information and belief do not give	
jurisdiction	632
amount due must be stated in affidavit for.....	635
how statement of amount due to be made.....	635
must appear that debt is due.....	635
how non-residence must be stated in.....	637
how foreign incorporation must be shown.....	638, 639
facts showing defendant has absconded, etc., must be stated	637
intent must be shown.....	619, 622, 637
need not be stated, no previous application made.....	639

ATTACHMENT—(Continued):

	PAGE
how other papers referred to in affidavit.....	639
deposition of party cannot be compelled.....	639
deposition of third party may be compelled.....	639
<i>prima facie</i> proof of fact sufficient.....	639
what must appear in, in action against public officer.....	640
affidavits must be filed	640
security on obtaining warrant.....	640
undertaking must be given.....	640
if undertaking defective, new one may be ordered.....	641
when amount of undertaking will be increased.....	641
liability of sureties.....	641
sureties not exonerated by vacating for error.....	683
warrant improperly granted, no defense to sureties.....	642
warrant must be subscribed by judge and attorney.....	642
must recite grounds of attachment.....	643
to what sheriff, warrant directed.....	642
form of warrant	642
several may be issued	642
may be amended	642
execution of warrant, must be by sheriff.....	644
how to be executed	644
levy upon, not made after final judgment.....	644
sheriff may require indemnity.....	645
inventory to be returned	645
return of the attachment	645
what property may be attached.....	646
real property may be levied upon.....	646
how levy made upon real property.....	650
<i>lis pendens</i> to be filed.....	650
personal property, what may be levied upon.....	646
mortgaged property, what may be levied upon.....	646
money collected by sheriff.....	646
property of a firm	646
property of foreign corporation.....	647
property disposed of, with intent to defraud creditors.....	647
stock of defendant in corporation	647
stock of foreign corporation, when not leviable upon.....	648
may be levied upon chose in action.....	649
choses in action transferred before levy, not levied upon against assignor	649
legal debt only can be levied upon.....	650
levy upon personal property capable of manual delivery, how..	651
failure to deliver copy warrant, does not invalidate levy.....	651
levy on property not capable of manual delivery, how made..	652
includes property pledged.....	652
judgment how levied upon	653
notice of property levied on, what sufficient.....	653

ATTACHMENT—(*Continued*):

	PAGE
duty of debtor after levy	654
upon property discovered in action by sheriff.....	655
warrant of, lien from time of levy.....	655
levy does not relate to time of original demand of property....	656
when certificate to be furnished by possessor of property.....	657
order for examination, if certificate refused.....	658
when such order may be granted.....	658
what examination may be had under such order.....	658
remedy of sheriff after examination.....	659
master of vessel, when entitled to undertaking upon levy.....	660
form of undertaking	660
inventory to be made by sheriff.....	660
to be filed within five days.....	661
failure to make, does not invalidate levy.....	661
may be amended	661
return of, may be compelled.....	661
what suits may be brought by sheriff with regard to attached property	661
when plaintiff in action may sue to collect attached property...	662
when plaintiff may be joined with sheriff in action already brought	663
court may direct as to prosecution of such action.....	663
what application may be made as to, by plaintiff in second warrant	690
when plaintiff in second warrant, substituted in action.....	690
when plaintiff in second warrant, allowed to bring action.....	690
rights of plaintiff in third and subsequent warrants.....	690
how far sheriff may attack assignment as fraudulent.....	664
how property kept by sheriff.....	666
when sheriff may be compelled to pay money into court.....	666
lien of sheriff upon levy, nature of.....	666
duty of sheriff as to books taken.....	666
money lost, who liable for.....	666
when court may release property attached.....	667
when court may direct things in action to be sold.....	693
notice of application for such order.....	693
perishable property may be sold.....	667
adverse claim to property, how tried.....	668
proceedings on claim of vessel.....	670
proceedings on claim of foreign vessel.....	671
who may move to vacate or modify warrant.....	673
what lienor may move to vacate or modify.....	673
upon what grounds he may move.....	673
lienor need not become party to suit.....	674
defendant may move to vacate, although undertaking has been given to release property	675
what is such application of property as bars right to move...	675

ATTACHMENT—(Continued):

	PAGE
motion to vacate for irregularity, when must be made.....	676
motion upon papers, to vacate, when made.....	676
what papers may be used by lienor.....	677
when motion made on papers, no opposing affidavits to be read	677
what proof by moving party permits new affidavits to be read..	677
when motion may be founded on new proof by affidavit.....	678
what constitutes new proof	678
what plaintiff may establish by new affidavits	678
when more than one motion to vacate may be made.....	680
motion to vacate on papers, when granted.....	680
court will not pass on merits on motion to vacate.....	681
effect of vacating for irregularity.....	682
effect of vacating, where erroneously issued.....	683
duty of sheriff, where vacated for irregularity.....	683
when sureties not discharged by vacating.....	683
application for discharge of property from, defendant only may make	683
part of property may be discharged.....	683
what notice of application required.....	684
when court to direct notice to be given.....	684
undertaking required on such application.....	685
to be presented at time of application.....	685
form of, when application made by less than all defendants	685
must be filed with clerk	685
justification of sureties on	685
sheriff responsible for sufficiency of sureties on.....	686
sheriff, when must retain possession of property.....	686
application for discharge of vessel from.....	686
application by partners to discharge property from.....	687
what undertaking to be given on.....	687
how amount of undertaking fixed	687
what notice of application to be given.....	687
duty of sheriff, where second warrant issued.....	688
how levy made under second warrant.....	688
when levy cannot be made under second warrant.....	688
preference, where two or more warrants issued.....	689
rights of plaintiff in second warrant against foreign vessel....	689
when may be attached under subsequent warrant.....	689
when cannot be attached after release.....	689
judgment upon, how stayed.....	691
execution upon, <i>see</i> EXECUTION.	
unsold property levied upon, how disposed of.....	693
application for order of sale for.....	693
what notice of application to be given.....	693
when person having property of foreign corporation may be required to pay on	693
after warrant annulled, to whom property delivered.....	694

ATTACHMENT—(*Continued*):

	PAGE
sheriff must deliver books, etc., to defendant.....	695
when assignment of undertakings must be delivered to defendant	695
after vacating, defendant to be substituted as plaintiff in suit by sheriff	695
<i>lis pendens</i> to be cancelled after vacating.....	696
return to be filed after vacating.....	696
warrant of may be amended.....	788

See, also, PROVISIONAL REMEDIES.

ATTORNEY:

admission to practice, and removal of.....	29
proceedings to punish	30
effect of suspension or removal.....	33
how controlled by the court.....	33
how punished for deceit or collusion.....	35
not to lend his name.....	35
not to buy choses in action with intent to bring suit.....	35
such intent, however, must be proved.....	36
what not forbidden	36
shall not pay to procure claims for suit.....	36, 46
for what purpose may receive thing in action.....	37
shall not be bail or surety.....	37, 298
only those admitted can practice in city of New York.....	37
proceedings upon death, removal or disability of.....	37, 286
service of notice on surviving partner sufficient.....	38
when privileged from arrest.....	38
authority to practice presumed.....	39
when authority must be proved.....	39
when must disclose client's address.....	39
powers and limitations under retainer.....	39
and client, when relation ends.....	43
how substituted	44
lien of, upon papers for services.....	44
may agree with client for compensation.....	45
when court may set aside such agreement for compensation...	45
extent of lien of.....	46
whether notice of lien required.....	50
right of parties to settle without regard to lien.....	48
lien of, how may be enforced.....	48
when compensation of, may be fixed by summary proceedings...	50
for one suing as poor person, lien of.....	50
punished for including scandalous matter in pleading.....	52
not to disclose professional communications.....	52
must serve for poor person without compensation.....	135
when may act as guardian ad litem.....	182
summons must be signed by.....	192
effect of appearance by.....	232

ATTORNEY—(Continued):		PAGE
when authority to appear may be disputed.....		232
papers must be signed by.....		283
service upon, how made.....		286
when to cause papers to be filed.....		291
when verification may be made by.....		340
will be charged with costs on motion to expunge scandalous matter		300
AWARD:		
cannot be made on Sunday.....		5
B.		
BAIL:		
sheriff cannot be		22
attorney cannot be		37
<i>Sec, also, ARREST and BAIL.</i>		
BANK BILLS:		
not within statute of limitations.....		110
BANKING ASSOCIATION:		
actions by or against may be in name of president.....		146
actions by or against stockholders of.....		148
receiver in, proceedings against.....		730
BILLS AND NOTES:		
counterclaim against transferee of overdue.....		451
BILL OF ITEMS:		
when party entitled to		351
demand must be made for.....		352
what must be stated in.....		352
when further account will be ordered.....		352
penalty for failure to serve.....		352
BILL OF PARTICULARS:		
in what cases will be ordered to be delivered.....		353
discretionary with the court.....		353
obtained only by order.....		353
office of	353,	358
granted in actions for tort.....		354
application for, how made.....		355
affidavit for, what should state.....		356
order for, form of		357
what should be contained in.....		358
further bill, when granted.....		359
effect of		359
penalty for disobedience		360
penalty for disobedience, may be inserted in order.....		360
BOARD OF SUPERVISORS:		
when may sue or be sued.....		156

BONDS:	PAGE
when leave to sue upon necessary.....	125
<i>Sec.</i> also, UNDERTAKINGS.	
BOOKS AND PAPERS. <i>See</i> DISCOVERY OF BOOKS AND PAPERS.	

C.

CASE:	
amendment of	790
CAUSE OF ACTION:	
what constitutes a single.....	403
test of servivability of.....	808
what may be joined in complaint, <i>see</i> COMPLAINT.	
<i>Sec.</i> also, ACTION.	
CHANCERY:	
when proceedings had according to practice of.....	2
CHATTEL:	
action for, when barred.....	93
CIRCUIT COURT:	
abolished and jurisdiction vested in trial term.....	3, 4
CITY COURT OF THE CITY OF NEW YORK:	
terms of	10
always open for transaction of <i>ex parte</i> business.....	10
how constituted	68
jurisdiction of	69
as to marine causes.....	70
cannot naturalize an alien.....	70
no equitable jurisdiction	70
order or warrant granted by justice only.....	71
limitation of action on judgment of.....	91
CIVIL ACTION:	
defined	80
CLAIMS:	
attorney shall not pay to procure, for suits.....	339
against the people, when barred.....	103
CLERK:	
to open and adjourn court in judge's absence.....	11, 12
of courts, how appointed	16
county clerk to be, of Supreme Court.....	16
duties and powers of.....	16-18
fees of, how fixed	18-19
fees may be required in advance.....	19
to receive fees only when allowed by law.....	19
must appoint deputy	20
shall not practice as attorney.....	20
deputy clerk not to practice as attorney.....	20
office. when to be kept open.....	20
when papers may be served on.....	287

CODE:	PAGE
where no provision made by, what practice controls.....	2
COMMENCEMENT OF ACTION:	
what is, under statute of limitations.....	118
COMMISSION:	
how opened and filed.....	18
to take testimony may be amended.....	791
COMMISSIONERS OF HIGHWAYS:	
when may sue or be sued.....	155
COMMITTEE:	
of incompetent person, leave to sue in actions by and against..	132
cannot sue as poor person.....	136
how and when appointed.....	199
COMPENSATION:	
attorney may agree with client for.....	45
when court may set aside such contract for.....	45
of attorney, when may be fixed by summary proceedings.....	50
of receiver	724, 749
COMPLAINT:	
may be served with summons.....	193
when dismissed for failure to serve summons.....	314
when dismissed for failure to serve copy.....	423
when dismissed for unreasonable neglect of plaintiff to proceed	314
common counts in assumpsit, good under code pleading.....	320
causes of action to be separately stated in.....	332
amendment of, <i>see</i> AMENDMENT.	
what must contain	391
name of court must be stated in.....	392
in Supreme Court, name of county must be stated in.....	393
effect of omission of name of court from.....	393
remedy for failure to state county.....	393
effect of failure to state proper county.....	393
names of parties must be stated in.....	394
what facts to be stated in.....	396
what facts need not be stated in.....	398
how facts to be stated in.....	398
where corporation, party, incorporation must be alleged.....	400
when allegations of demand necessary in.....	401
certain allegations necessary for certain actions.....	401
joinder of causes of action in.....	402
actions arising on contract.....	406
for libel or slander.....	407
for personal injury	407
for injuries to real property.....	408
for injuries to personal property.....	409
for ejectment	408
to recover chattels	409
upon claim against trustee.....	410

COMPLAINT—(*continued*):

	PAGE
claims arising out of same transaction.....	405, 411
for penalties under the fisheries, game and forest law..	402, 405
special instances	413
against same person individually and as executor.....	414
how objection of misjoinder taken.....	417
what causes may not be joined in.....	415
demand for judgment	417
what relief may be demanded.....	418
where no answer, only judgment demanded to be granted....	418
what judgment granted, where answer interposed.....	418
demand should not be vague or hypothetical.....	420
demand, does not necessarily characterize action.....	421
demurrer will not lie to demand in.....	421
costs need not be demanded	421
interlocutory and final judgment may be demanded.....	421
where injunction sought, it should be demanded in.....	422
when and how to be served.....	422
consequence of failure to serve.....	423
when discovery granted to enable party to frame.....	837
grounds of demurrer to, <i>see</i> DEMURRER.	

See DISCOVERY OF BOOKS AND PAPERS.

COMPROMISE:

when defendant may make offer of.....	768
may be made in any action.....	768
when judgment entered on, will be set aside.....	768
must be accepted within ten days.....	769
offer of	769
how made, when more than one defendant.....	770
signature of party to offer, how proved.....	770
how proved if made by attorney.....	771
offer of, operates as stay of proceedings.....	771
when plaintiff may make offer.....	772
acceptance of offer, how made.....	772
action does not abate after acceptance of.....	772
if offer refused, cannot be given in evidence.....	773
effect of, upon costs	773
judgment roll on offer, may be amended.....	771, 783

CONDITION PRECEDENT:

how alleged in pleading	328
-------------------------------	-----

CONSANGUINITY OF JUDGE:

disqualifies	12-14
--------------------	-------

See JUDGE.

CONSOLIDATION OF ACTIONS:

when it will be ordered.....	304
who may move for.....	304
when plaintiff may move.....	304

CONSOLIDATION OF ACTIONS—(<i>Continued</i>):	PAGE
what defendant must show on moving.....	305
what actions will be consolidated.....	305
costs upon consolidation.....	306
of separate actions against joint debtors.....	307
CONSTABLE:	
limitation of action against.....	97, 100
CONSTRUCTION OF PLEADINGS. <i>See</i> PLEADINGS.	
CONTINUANCE OF ACTION:	
on death of sole party.....	814
only made by motion	815
rule as to, in equitable and legal actions now the same.....	815
may be had on application of defendant.....	816
successors in interest to be substituted.....	816
court has only certain jurisdiction to direct.....	817
on motion for, pleading controls on question of survivability...	818
what objections may be taken at trial, after.....	818
on substitution, prior proceedings stand.....	818
on death of one of several parties, if entire cause of action survives	819
where cause of action continues to surviving plaintiff.....	819
in action by tenants in common for conversion.....	819
in action of ejectment by tenants in common.....	820
after death of defendant, who is not a necessary party.....	820
when may bring in executors of co-defendant.....	820
when executors of defendant jointly liable, to be substituted...	820
when defendants are jointly and severally liable.....	820
where part of cause of action survives.....	821
where interest has been transferred, etc.....	822
against foreign corporations.....	824
by and against public officers.....	824
rules for, in ejectment.....	825
rules for, in partition.....	826
application how made.....	827
notice of, to whom given.....	827
supplemental complaint, when may be ordered on.....	827
where actions survive, no suggestion of death necessary.....	828
proper proceedings, where action continues to survivors.....	828
when cross action may be ordered on application for.....	828
CONTEMPT:	
how order served to bring party into.....	276
CONTRACT:	
when action on barred.....	92
when injunction granted to restrain violation of.....	548
CONVENTION:	
to make rules	1

CONVEYANCE:	PAGE
of property, when may be ordered.....	751
COPYRIGHT:	
when violation of, restrained by injunction.....	548
CORONERS:	
power and duties of	26
fees of, when acting as sheriff.....	27
limitation of action against.....	97, 100
CORPORATION:	
limitation of action against directors of domestic.....	98
of action against directors of moneyed.....	98
of action against foreign.....	103
of action, on evidence of debt of.....	111
leave to sue in action to dissolve.....	128
in action against, directors not proper parties.....	147
action against agent of for malfeasance, by whom brought....	148
action by creditor of	148
action against, when to be brought by people.....	153
how summons served upon.....	205
remedy for irregular service of summons upon.....	206
when verification of pleading necessary, to require party to prove existence of.....	336
verification of pleading by domestic.....	339
injunction against, when granted.....	560
against municipal	563
against religious	562
corporate ordinance, when enforcement of restrained.....	563
receiver of, <i>see</i> RECEIVER OF CORPORATION.	
dissolution of, when abates action.....	809, 823
when person having property of foreign, may be required to pay on attachment	693
judgment against foreign, by publication, against what prop- erty enforced	693
actions against foreign, how continued.....	824
COSTS:	
to be taxed by clerk	18
when receiver will be charged with.....	130
of motion	271, 281
on order of interpleader.....	313
when need not be asked in complaint.....	421
receiver, when liable for.....	722
where tender has been made.....	759
upon offer to liquidate damages.....	767
after offer to compromise	773
COUNTERCLAIM:	
of title to real property, when made.....	83
effect of discontinuance of action on, under statute of limita- tions	109

COUNTERCLAIM—(<i>Continued</i>):	PAGE
cause of action barred by statute, cannot be set up as.....	114
defense of statute of limitations, must be pleaded.....	117
each, to be separately stated in pleading.....	331
what is	439
distinction between set-off, recoupment, and.....	439
construction of phrase "must tend to diminish or defeat plaintiff's recovery".....	440
must always contain cause of action.....	441
must be against all plaintiffs.....	442
when must belong to all defendants.....	442
must belong to defendant at commencement of action.....	443
meaning of phrase "transaction set forth in complaint".....	443
meaning of phrase, "subject of action".....	446
what may be set up as, in action on contract.....	448
against assignee of contract.....	449
against transferee of over-due paper.....	451
against one litigating in representative capacity.....	451
in matrimonial actions	453
not allowed against people.....	453
when defendant must plead.....	453
must be pleaded as such.....	454
how far bar to another action.....	455
judgment on	455
affirmative judgment on, must be demanded in answer.....	456
when plaintiff may reply to.....	457
grounds of demurrer to, <i>see</i> DEMURRER.	
right of defendant to provisional remedy on pleading.....	753
COUNTY:	
how to sue and be sued.....	156
must be stated in complaint in action in Supreme Court.....	393
<i>See, also, COMPLAINT.</i>	
COUNTY COURT:	
terms of	10
always open for the transaction of <i>ex parte</i> business.....	10, 77
county clerk to be clerk of.....	16
how constituted	71
jurisdiction of	71
no jurisdiction over two thousand dollars.....	71
jurisdiction of, how determined.....	72
where jurisdiction exists same as Supreme Court.....	73
mandates of, to be enforced as in Supreme Court.....	73
may send mandates into another county.....	73
court of limited, and not general jurisdiction.....	73
special cases of jurisdiction of.....	73
when justice of Supreme Court, may make orders in.....	78

COUNTY JUDGE:

PAGE

power of, in action in county court.....	73
when has power of justice of Supreme Court.....	77
limitation of power to make order.....	78
when cannot make order to show cause.....	78

COUNTY TREASURER:

when leave granted to sue official bond of.....	126
when supervisors parties plaintiff in action on bond of.....	156

COUNSELLOR. See ATTORNEY.

COURT OF APPEALS:

where rules silent, practice in court of errors followed.....	2
terms of	6, 7
jurisdiction of	60,
what judgments appealable to.....	61, 62
what orders appealable to.....	61, 62
jurisdiction of, not limited by amount.....	61, 63

COURT OF CLAIMS:

court of record	4
continuation of Board of Claims.....	4
terms of	11

COURTS OF RECORD:

enumerated	3
may make rules	3
sittings of, must be public.....	4
cannot be open to transact business on Sunday.....	4
formerly not open on election or town meeting day.....	6
may be open on holidays other than Sundays.....	6
must be held as appointed	8
extraordinary terms of, how appointed	8
actions in, may be tried elsewhere than at court house.....	9
how adjourned	11
how adjourned, in absence of judge.....	11
judges of, not to practice	15
seals of	16
duties of clerk of	16, 18
will correct mistakes of officer.....	18
extent of control over attorney.....	30, 33
jurisdiction of	55
only within the state	55
restricted by constitution and laws of United States.....	55
intention to deprive of, not presumed.....	56
in suits in which other governments are parties.....	56
in bankruptcy cases	56
in suits by and against foreign corporations.....	56, 59
on causes of action arising without the state.....	56
for specific performance of contract to convey lands without the state	57

COURTS OF RECORD— (<i>Continued</i>) :	PAGE
in certain cases, limited.....	57
in patent cases	58
as to lands outside of the state.....	58
as to penal laws of another state.....	59
on <i>habeas corpus</i> by United States soldier.....	59
of property of non-resident, attached within the state.....	59
in ejectment, against person claiming as United States officer	60
jurisdiction of Court of Appeals, <i>see</i> COURT OF APPEALS.	
jurisdiction of Supreme Court, <i>see</i> SUPREME COURT.	
power of judges out of, <i>see</i> JUDGES.	
name of, must be specified in complaint.....	393
power of, to relieve against mistakes, not given by statute....	797
COURTS WHICH HAVE BEEN ABOLISHED:	
enumerated	3, 68
jurisdiction of, now in Supreme Court.....	3, 63, 68
judges of, now Supreme Court justices.....	3, 63
described	68
leave to sue on judgments taken in.....	122
COVENANTS:	
when violation of, will be restrained by injunction.....	554
CREDITOR:	
when one may sue for all.....	159
CRIMINAL ACTION:	
defined	80
D.	
DAMAGES:	
matters in mitigation of, how pleaded.....	438
sustained by injunction, to what extent plaintiff liable for....	599
how such damages ascertained	601
when offer to liquidate may be made.....	767
effect of acceptance or refusal of offer to liquidate.....	767
DEATH:	
of occupant does not affect right to possession of real property..	89
judgment may be rendered after, on verdict rendered before....	830
when action for personal injury does not abate by.....	830
verdict, report or decision after, void.....	831
motion cannot be decided after.....	831
<i>See, also, CONTINUANCE OF ACTION.</i>	
DEFAULT:	
when attorney may open	40
on contested motion.....	270
DEFENDANT:	
when may defend as poor person	137
who may be joined as	139

DEFENDANT—(*Continued*) :

	PAGE
in actions against stockholders or directors of corporations....	147
against trustees for filing false report	149
in actions against stockholders of corporations.....	149
when people may be	155
jointly or severally liable, how to be sued.....	161, 164
in actions on written instruments.....	162, 164
in actions for tort, how joined.....	163, 165
severally liable, proceedings against.....	164
who must be, in ejectment	166
when person claiming title may be joined as, in ejectment....	169
who should be, in partition	172
when creditor may be in partition.....	174
unknown, how served in partition.....	174
who must be in action for dower.....	174
in action for foreclosure	176
parties liable for payment of mortgage, may be joined, as.....	177
in action to compel determination of claim to real property....	178
who may be, in action for waste.....	179
who may be joined as, in action for a nuisance.....	180
where unknown, how to be designated.....	180
when true name may be inserted.....	181
must be allegation that name is unknown.....	181
when infant is, <i>see</i> INFANT.	
service of summons upon	198
<i>See, also, SUMMONS.</i>	
when allowed to defend, after service by publication.....	228
when may appear, though not served with summons.....	334
<i>See, also, APPEARANCE.</i>	
when must serve answer	235
time to answer of, when arrested.....	236
when may file notice of pendency of action.....	240
when may move to dismiss complaint for neglect.....	314
when must serve copy of answer on co-defendant.....	334
charged with fraud, when not excused from verifying pleading.	337
pleadings on part of.....	425
when must plead counterclaim	453
when may move to vacate warrant of attachment.....	673
when discharged from arrest, on giving bail, or deposit.....	525
undertaking on attachment, when delivered to.....	695
after attachment vacated, substituted as plaintiff in place of sheriff	695
right of, to provisional remedy on pleading counterclaim....	587, 753
<i>See</i> SATISFACTION.	
when may make offer to compromise.....	768
when assignee of, may be substituted in action.....	823
discovery by, <i>see</i> DISCOVERY OF BOOKS AND PAPERS.	

DEFENSE:	PAGE
cause barred by statute of limitation cannot be set up as.....	114
of statute of limitation, must be pleaded to be available.....	117
each, to be separately stated in pleading.....	331
dilatory, must be verified.....	335
sham, what is	382
may be stricken out.....	381
when answer not stricken out as.....	382
defendant may interpose all in one answer.....	436
need not be consistent.....	436
when defendant required to elect between.....	437
any existing at time of answer may be pleaded.....	437
partial, may be pleaded	437
what is partial	438
what may be interposed, in action against bail.....	536
DELIVERY OF PROPERTY:	
when may be ordered	751
DEMAND:	
limitation of action, where demand necessary.....	112
DEMURRER:	
cannot be interposed to demand for judgment.....	421
what it is	462
when it lies.....	462
grounds of, to complaint	461
that the court has no jurisdiction.....	468
that plaintiff has not capacity to sue.....	469
another action pending.....	469
misjoinder of parties plaintiff.....	470
defect of parties plaintiff or defendant.....	471
misjoinder of causes of action.....	472
failure to state cause of action.....	474
grounds of, to pleadings after complaint.....	463
to answer	476
to counterclaim	477
to reply	478
for what will not lie.....	464
when may be interposed to supplemental pleading.....	465
only to be interposed to whole cause of action or defense.....	466
how objections must be taken by.....	465
what objections not taken by, deemed to be waived.....	466, 481
when may be joined with answer.....	467
what allegations admitted by.....	467
amendments after decision of.....	479
rule of allowance at common law.....	479
allowance of, in discretion of court.....	480
when leave to amend not granted.....	480
effect of amendment	486
when objection to pleading waived.....	481

DENIALS. *See* ANSWER.

PAGE

DEPOSIT:

of money, when may be ordered..... 751
effect of 751

See PAYMENT INTO COURT.

DEPOSITION:

to be used on motion, when may be taken..... 260
application for 261
what must appear by..... 261
what notice required 261
of party cannot be taken..... 261
when opposite party cannot oppose..... 261
where person to be examined must attend..... 262
when may move to vacate order..... 262
of party cannot be compelled on attachment..... 639
of other than party, can be compelled on attachment..... 639

DESCENT CAST:

does not effect right of possession..... 88

DISABILITIES:

under statute of limitations.....89, 110
must exist when right of action accrued.....90, 110
in action for dower 110

DISCHARGE:

from arrest, must be given to defendant on giving bail, or
deposit 525
of bail, before expiration of time to answer..... 537

DISCONTINUANCE:

attorney may stipulate for 39
effect of, on limitation of action, where counterclaim interposed 109

DISCOVERY OF BOOKS AND PAPERS:

what courts may order..... 832
an action cannot be maintained to aid a discovery in another
action 832
application for must be made under code of civil procedure.... 832
must be by petition 842
distinction between, and examination before trial..... 833
granting of, discretionary 833
must be necessary.....833, 834
includes power to compel deposit for inspection..... 834
only granted to enable party to obtain information necessary for
his own case..... 834
when not ordered of all books and papers..... 834
may be ordered of books and papers of corporation..... 835
may be ordered of books and papers of receiver..... 835
when ordered in actions between partners..... 836
by principal of books of agent..... 836

DISCOVERY OF BOOKS AND PAPERS—(<i>Continued</i>):	PAGE
cases in which not ordered.....	836
application for, by whom made.....	837
when granted, before cause at issue.....	838
when granted after issue	840
petition for, what must contain.....	842
what facts and circumstances must be stated in.....	842
must be verified by affidavit.....	842
must be verified by party.....	844
when certificate of referee, sufficient proof for.....	845
order to show cause, what to contain.....	845
should contain directions as to manner of discovery.....	846
peremptory order cannot be made <i>ex parte</i>	845
proceedings upon return of.....	847
when order will be denied on hearing of.....	847
order for discovery, what to contain.....	845
when may operate as stay.....	846
by whom may be vacated.....	846
for what reasons will be vacated.....	846
proceedings under order	848
referee may be appointed to superintend.....	848
power of referee	849
order should be strictly obeyed.....	849
denied where party is not able to produce.....	847
party may be examined under oath before referee.....	849
when part of book may be sealed.....	849
how sealed portions procured to be opened.....	850
proceedings, if order not complied with.....	850
effect of papers produced as evidence.....	850
penalty for disobedience of order.....	850
DISMISSAL:	
of complaint, for failure to serve summons.....	314
for unreasonable neglect to proceed.....	314
for neglect, when defendant waives right to move for....	315
defendant cannot move for, if counterclaim pleaded.....	316
for failure to serve copy, when granted.....	423
effect of judgment of.....	316
DIVORCE:	
notice published with summons, in action of.....	226
counterclaim in action for.....	453
DOWER:	
action for, when to be brought.....	84
disability, in action for	110
what prevents running of statute c' limitations.....	110
who defendant, in action for.....	174
effect of notice of pendency in action for.....	241
undertaking required on injunction to stay proceedings in....	594

E.

EASEMENTS:	PAGE
when encroachment upon, restrained.....	555
EJECTMENT:	
proof of authority by attorney to bring.....	39
who may be plaintiffs in.....	166
by grantee under void conveyance.....	168
who must be defendant in.....	168
when person claiming title may be joined as defendant in....	169
notice of pendency must be filed in action of	239
effect of such notice.....	241
undertaking required, on injunction to stay proceedings in....	594
does not abate by death.....	811
substitution of parties in action for, brought by grantee in name	
of grantor	816
continuance of action for, by surviving tenants in common....	820
when grantee of defendant in, need not be substituted.....	823
rules for substitution of parties in.....	825
ELISORS:	
when and by whom appointed.....	29
ENTRY:	
upon real estate, when sufficient as a claim.....	85
EQUITY:	
jurisdiction of Supreme Court, what it includes.....	65
actions in, when barred.....	101
ESCAPE:	
limitation of action for.....	100
ESCHEAT:	
people plaintiff, in action to enforce.....	154
EXECUTION:	
levy of, by sheriff.....	22, 24
when sheriff cannot purchase under.....	22
after warrant of attachment, form of.....	691
to what sheriff directed.....	691
by whom allowed after death of defendant before judgment.	692
in what order property sold under.....	692
sheriff must regain possession of personal property lost after	
attachment	693
amendment of	781
EXECUTORS AND ADMINISTRATORS:	
limitation of action against.....	97, 106
by, when cause of action accrued in life of testator.....	106
may sue without joining persons benefited.....	140
only to sue or be sued in representative character.....	149
how judgment against, enforced.....	149

EXECUTORS AND ADMINISTRATORS— <i>(Continued):</i>	PAGE
all considered as one person.....	149
separate answers by, when allowed.....	149
to whom letters testamentary not issued, not necessary party..	149
foreign, cannot be sued within this State.....	149
what actions they may bring.....	150
of deceased partner, when not to be joined as defendant.....	152
to be sued personally on contracts made after testator's death..	152
counterclaim in action by or against.....	451
upon death of sole surviving, receiver may be appointed.....	709
when action may be continued by and against.....	807, 808
in what action to be substituted.....	816-818
EX PARTE:	
motion, what is.....	245
may be heard at special terms adjourned to chambers.....	9
requisite of affidavit on.....	254
renewal of.....	272
order of judge need not be entered.....	277
when may be entered.....	278
how vacated	280
when injunction will be vacated.....	606
EXTENSION OF TIME:	
how and by whom made.....	294
requirement of notice for, in certain cases.....	294
affidavit for, what must show.....	294
must be served with order.....	295
what does not operate as.....	295
by whom made, after time has expired.....	296
in what cases time cannot be extended.....	297
to appeal, by death of party.....	297
EXTRA ALLOWANCE:	
after offer of judgment.....	774
EXTRAORDINARY TERMS:	
of Supreme Court.....	8

F.

FEEs:	
of clerk, how fixed.....	18, 19
may be demanded in advance.....	19
trial, when payable	19
of sheriff	26
of coroner, when acting as sheriff.....	27
FIDELITY OR SURETY COMPANY:	
undertaking by	298
when statement of condition to be made.....	300
where to be filed.....	306

FILING OF PAPERS:	PAGE
when order for filing will be granted.....	290
in special proceedings, where filed.....	291
undertaking when to be filed.....	291
in what office to be filed.....	291
in arrest and bail.....	524
on injunction, must be filed.....	597
in attachment must be filed.....	640
FIRST DISTRICT:	
where motions may be made in.....	249
FORECLOSURE:	
who must be plaintiffs in action for.....	175
who must be defendants in action for.....	176
one liable for payment of mortgage may be joined as.....	177
when notice of pendency must be filed in.....	237
effect of such notice.....	243
receiver in action for.....	707
FOREIGN CORPORATION:	
service of summons upon, how made.....	207
attachment against	619
<i>See CORPORATION.</i>	
FRANCHISE:	
when interference with restrained.....	556
FRAUD:	
when action for, barred by limitation.....	93, 94
arrest in actions for, <i>see ARREST and BAIL.</i>	
FRIVOLOUS PLEADING:	
judgment on	379
<i>See PLEADING.</i>	

G.

GENERAL APPEARANCE. *See APPEARANCE.*

GENERAL RULES:

by whom made	2
binding upon courts of record.....	2
must be consistent with code.....	2
when to take effect.....	2
where none made, what practice controls.....	2
<i>See RULES.</i>	

GUARDIAN AD LITEM:

not a party	12
when must be appointed.....	182
who may be, for infant.....	182
when court may appoint, for incompetent person.....	199
<i>See INFANT.</i>	

H.

HABEAS CORPUS:	PAGE
may be issued and served on Sunday.....	5
by United States soldier, jurisdiction of.....	59
HIGHWAY:	
action for animal seized in, when barred.....	100
when obstruction of restrained.....	557
HOLIDAYS:	
noon to midnight of Saturday to be.....	6
to be considered as Sunday.....	6
service on, except Sunday, valid.....	6
court may be open on, except Sunday.....	6

I.

INFANT:	
leave to sue, in action of partition by.....	133
may obtain leave to sue as poor person.....	135
when may bring action of partition.....	170
plaintiff	182
guardian <i>ad litem</i> must be appointed for.....	182
who may be guardian for.....	182
when attorney or officer of court must act.....	183
consent must be produced before appointment.....	183
application for appointment of guardian for, how made..	183
by whom made.....	183
to whom made.....	185
to whom made in actions for partition.....	184, 185
what must show	185
security by guardian for, in action of partition.....	186
clerk, when appointed guardian, must give security.....	187
guardian of, not to receive property without giving security	187
court may direct new bond to be given by guardian of....	187
effect of failure to appoint guardian <i>ad litem</i> for.....	187
compensation of guardian <i>ad litem</i> for.....	188
defendant	182
must appear by guardian <i>ad litem</i>	182
application for guardian <i>ad litem</i> for, how made.....	183
when to be made	183
notice of	184
what must show	185
when absent from State, how guardian appointed.....	186
when summons may be served on such guardian....	186
duties of guardian <i>ad litem</i> of.....	187
such guardian not liable for costs.....	188
how summons served upon.....	198
when appearance must be made by.....	235

INFANT—(Continued):

PAGE

when may be arrested.....	499
receiver in action by or against.....	709

INJUNCTION:

with order to show cause, when ceases.....	279
defined.....	539
distinction between final and temporary.....	540
temporary, when granted by order.....	539
object of granting temporary.....	540
only granted in cases prescribed in code.....	541
granting of, discretionary with the court.....	541
only granted in action.....	542
plaintiff's rights must be clear.....	542
injury must be irreparable.....	543
when inadequacy of legal remedy must appear.....	543
when will be refused for laches.....	543
only granted when necessary to protect plaintiff's rights.....	544
where right to, depends upon nature of action.....	544
applies only to suits in equity.....	544
can be granted only on complaint.....	545, 585
must be asked for in prayer for judgment.....	422, 545
restrictions upon granting.....	545
where right depends partly upon extrinsic facts.....	546
meaning of phrase "subject of the action".....	546
may be granted before service of complaint.....	546
various cases where injunction will be granted.....	547
violation of contract.....	548
violation of copyright.....	548
corporations.....	549
directors of corporations.....	549
in action for sequestration.....	551
to vacate incorporation.....	551
to annul corporation.....	551
creditors, when will be restrained from suing.....	551
religious corporations.....	552
municipal corporations.....	552
ordinances of municipal corporations.....	553
covenants.....	554
easements.....	555
franchises.....	556
highways.....	557
actions at law.....	558
actions in foreign courts.....	559
application should be made in the action and not by new suit.....	560
judgments.....	561
summary proceedings.....	563
nuisances.....	564

INJUNCTION—(Continued):	PAGE
<i>quo warranto</i>	566
official acts	567
tax-payer's action	567
various miscellaneous official actions	568
to restrain arrest	568
personal services	570
libel, publication of	571
private letters	571
publications	572
patents	572
taxes and assessments	572
trade marks, trade names, and unfair competition	573
trespass	576
torts	577
waste	578
water rights	579
proceedings to obtain order	581
application may be granted before service of summons	581
must be made before judgment	581
cannot be granted after judgment	581
by whom granted	581
at what term made	582
may be granted by appellate division	582
when can only be granted by court	582
power of judge to grant, where derived	582
in what cases county judge may grant	583
when may be made with or without notice	583
in what case notice must be given	584
not an ordinary proceeding in action	584
when continued after order to show cause	584
papers on which granted	585
when complaint must accompany application	585
affidavit only effective as proof of facts alleged	585
when complaint need not accompany application	586
verified complaint, when sufficient as affidavit	586
facts must be shown in, by positive affidavit	586
when allegations made on information and belief sufficient	586
must be filed forthwith	587
answer containing counterclaim	587
undertaking to be given on application	594
must be, on granting, to stay proceedings	594
what required to stay proceedings on judgment for money	594
when bond may be given in lieu of payment into court	596
to stay proceedings in action for ejectment or dower	594
plaintiff may supply, after injunction, on terms	597
required to restrain summary proceedings	596
what, to restrain judgment obtained by fraud	596

INJUNCTION—(Continued):

PAGE

when money paid into court, may be paid over to party..	596
proceedings in such case, if injunction vacated.....	597
must be filed	597
in actions relating to real property.....	598
in what action security not required.....	598
order should recite grounds for.....	588
what should show.....	588
parties only to be restrained by.....	589
agent of defendant, may be restrained by.....	589
service of order for.....	589
papers on which granted must be served with.....	589
undertaking must be served with.....	590
order cannot be served before summons.....	589
effect of	590
must be obeyed, if court had jurisdiction, although irregu- lar	590
parties to action, bound by.....	590
who bound by as agent.....	590
third parties not restrained by.....	590
when notice of, without service, sufficient to bind party....	591
how must be obeyed.....	591
punishment for violation of.....	592
who will be punished for violation of.....	592
advice of counsel, how far protected in such case.....	592
damages sustained by, to what extent plaintiff liable for....	599
when right to, accrues	600
how ascertained	601
proceeding for, not part of action.....	601
order of reference to ascertain.....	602
who entitled to notice of proceeding, under.....	602
proceedings upon reference.....	602
what allowed	603
what allowed, in action of ejectment or dower.....	604
counsel fees, what allowed	604
allowed to corporation, etc., when defendant, officer, etc....	605
action on undertaking	605
vacating or modifying, order	606
when motion for, may be made without notice.....	606
when appellate division will hear application without notice	606, 607
when will be vacated <i>ex parte</i>	606
when notice of motion must be given.....	607
by whom motion to vacate may be made.....	607
when plaintiff may read papers in opposition to motion....	607
proof required, when made on papers on which granted....	607
in such case, plaintiff cannot make new proof to sustain...	607
verified complaint, when referred to, to sustain.....	607

INJUNCTION—(<i>Continued</i>):	PAGE
when second application may be made.....	608
effect of verified answer on hearing motion.....	586, 608
when injunction will be dissolved on motion.....	608
not vacated for irregular service.....	609
not vacated for defect of parties.....	609
motion not heard where action discontinued.....	609
on giving undertaking by defendant.....	598, 610
when merged in final judgment.....	610
not dissolved or vacated where cause removed to Circuit Court of United States.....	611
effect of subsequent proceedings in the action.....	611
<i>See, also, PROVISIONAL REMEDIES.</i>	
INJURY:	
when action for barred.....	93, 99
INSPECTION WITH COPY. <i>See</i> DISCOVERY OF BOOKS AND PAPERS.	
INSTRUMENT, FOR PAYMENT OF MONEY ONLY:	
how alleged in pleading	329
verification in action upon.....	340
INTERPLEADER:	
when will be ordered.....	308
what moving party must show.....	309
money or property must be brought into court.....	308, 311
when motion for will be denied.....	311
in action against savings bank	312
order for, what may provide.....	313
how appealable	313
costs upon	313
IRREGULARITY:	
when motion made for relief on ground of.....	246
form of notice of such motion.....	264
notice, what must specify.....	264
when notice need not specify.....	803
affidavit of merits not required on such motion.....	803
what are	798
distinction between technical and substantial.....	799
who may take advantage of.....	800
remedy for	801
motion to vacate must be made promptly.....	801
motion to vacate judgment for, when to be made within one year	802
only irregular proceeding set aside, on motion for.....	803
how waived	804
what, by general appearance	804
no waiver, without knowledge of facts.....	805
intention to waive, when inferred.....	805
what cured by verdict or judgment.....	805

ISSUES:	PAGE
motion for settlement of, when made.....	247
formed by copy of pleading served.....	334

J.

JOEFAIL:	
statute of	805

JOINDER OF CAUSES OF ACTION. *See* COMPLAINT.

JOINT STOCK ASSOCIATION:	
actions by or against, in name of president or treasurer.....	146
to what bodies provision applies.....	146, 147
includes suits by or against members.....	146
officers cannot all be joined.....	146

JUDGE:	
of certain abolished courts to be Supreme Court justices.....	3
adjournments in absence of.....	11, 12
shall not sit where a party, or interested.....	12, 13, 14
when may act, although interested.....	12, 13, 14
how disqualified by consanguinity or affinity.....	12, 13, 14
not to decide question argued, when not present.....	14
not to be interested in costs.....	14, 15
not disqualified, because resident of town interested in action...	15
not to practice in his own court.....	15
law partner or clerk not to practice in his court.....	15
of court of appeals, not to practice.....	15
of certain courts of record not to practice.....	15
not to sit in review of his own decision.....	15
when disqualified by age.....	17
power of, of Supreme Court.....	65
county judges in certain cases, powers of.....	73, 77
powers of, out of court.....	77
when court is of limited jurisdiction.....	77
who may make orders out of court.....	77
cannot grant stay of proceedings for more than twenty days...	267
when may vacate order	78, 280

JUDGMENT:	
entered on Sunday, void.....	5
may be entered on election or town meeting day.....	6
void by disqualification of judge.....	13-14
when may be entered or docketed.....	20
attorney may satisfy within two years.....	40
upon unauthorized appearance, may be set aside.....	43
limitation of action on.....	90
when leave to sue necessary	121
from what court leave to be obtained.....	122
may be granted, <i>nunc pro tunc</i>	123
how entered against defendants severally liable.....	164

JUDGMENT—(<i>Continued</i>):	PAGE
when may be taken without application to the court.....	193
motion to set aside, when made.....	245
how pleaded	326
on account of frivolousness of answer.....	379
<i>See, also, PLEADING.</i>	
demand for, in complaint	417
demand for in answer	456
interlocutory may be demanded.....	421
on counterclaim	455
on failure to reply	460
when proceedings upon will be restrained.....	561
undertaking required on injunction to stay proceedings upon..	594
how levy made upon	653
after attachment, how to be satisfied.....	692
on service by publication, on what property enforced.....	693
when entered for part of claim admitted.....	764
<i>See SATISFACTION—COMPROMISE.</i>	
confession of, may be amended.....	783
how may be amended	784
motion to vacate for irregularity to be made within one year..	802
what defects cured by.....	805
action not abated after interlocutory.....	830
cannot be entered on verdict, etc., rendered after death of party.	831
JUDGMENT CREDITOR'S ACTION:	
when barred by statute of limitations.....	95
against executors or administrators, how enforced.....	149
receiver in	705
JURISDICTION:	
of courts of record.....	55
cannot be exercised without the State.....	55
how restricted by constitution and laws of United States.....	55
intention to deprive courts of, never presumed.....	56
in suits by and against foreign corporations.....	56, 59
on causes of action arising outside of the State.....	56
for specific performance of contract to convey lands without the State	57
in certain cases limited.....	57
in patent cases.....	58
as to lands outside of the State.....	58
as to penal laws of another State.....	59
on <i>habeas corpus</i> by United States soldier.....	59
as to property of non-resident attached within the State.....	59
in ejectment, against person claiming as United States officer..	60
among what courts divided.....	60
when acquired in an action.....	189
by substituted service of summons.....	215

JURISDICTION— (<i>Continued</i>):	PAGE
of person, given by general appearance.....	231
of subject matter, not given by appearance.....	232
irregularity which goes to, when cannot be waived.....	804
of various courts, <i>see</i> their respective titles.	
JURORS:	
may be drawn for adjourned term.....	11
JURY:	
may be discharged on Sunday.....	4
no instructions to be given to, on Sunday.....	6
cannot assess damages or deliver verdict on Sunday.....	5
JUSTICES:	
of Supreme Court, to appoint special and trial terms in certain cases	7, 8
judges of certain abolished courts to be.....	3
may sit in another department if duly designated.....	8
not to practice	15
powers of	65
what may do, out of court.....	77
when may make orders in action in county court.....	77
JUSTICE'S COURT:	
limitation of actions, upon judgment of.....	91
L.	
LACHES:	
what excuses, on motion to vacate for irregularity.....	801
LANDLORD:	
when possession of tenant, not adverse to.....	88
LEAVE TO SUE:	
when necessary	121
in action on judgment.....	121
in action on mortgage.....	124
in action on official bond.....	125, 304
in action to dissolve a corporation.....	128
in action by receiver	130
in action against receiver.....	131
in action by or against committee of incompetent person.....	132
in action of partition by infant.....	133
as poor person	134
when party may have leave to defend.....	137
receiver, must be obtained from court.....	718
LIBEL:	
rule for pleading in.....	330
when publication of, restrained by injunction.....	571
LIEN:	
of attorney for services.....	44

LIEN—(*Continued*):

PAGE

of attorney, whether notice of required.....	50
right of parties to settle without regard to.....	48
how may be enforced.....	48
of one suing as a poor person.....	51

LIMITATION OF ACTION:

includes special proceedings.....	118
by people for the recovery of real property.....	82
what adverse possession bars people.....	82
by party other than people, for recovery of real property.....	83
for dower.....	84
when limitation begins to run against real property.....	84
entry, when sufficient as a claim.....	85
presumption of title.....	85
occupation presumed to be under legal title.....	85
possession under written title, what included in.....	85
when deemed adverse.....	85
possession not founded on written instrument, what included in.....	87
when deemed adverse.....	87
possession without claim, not sufficient.....	88
when possession of tenant, not adverse to landlord.....	88
right not impaired by death of occupant.....	89
what disabilities prevent running of the statute.....	89, 110
actions other than for the recovery of real property.....	90
judgment or decree of court of record.....	90
presumption as to payment of.....	90
how presumption overthrown.....	90
how presumption of payment pleaded.....	91
to redeem from mortgage, when barred.....	92
on sealed instrument.....	92
for specific performance.....	92
to enforce payment of legacy charged on land.....	92
forty years, what actions barred in.....	82
twenty years, what actions barred in.....	83-90
six years, what actions barred in.....	93
five years, what actions barred in.....	96
three years, what actions barred in.....	97
two years, what actions barred in.....	99
one year, what actions barred in.....	100
ten years, what actions barred in.....	101
on contract, when barred in six years.....	92
against coroner or constable.....	97, 100
for penalty or forfeiture.....	99
to the people.....	99
given to the prosecutor.....	100
against executor or trustee.....	97
for negligence.....	98, 101
for personal injury.....	93, 99

LIMITATION OF ACTION—(<i>Continued</i>):	PAGE
for death by negligence	99
to annul a marriage	96
for escape	100
to recover strays seized on the highway.....	100
to recover excess of interest paid.....	100
against trustee, for debt of corporation.....	100
for equitable relief	101
by the people for spoliation.....	102
applies to the people	102
for claims against the people.....	103
against non-resident	103
against foreign corporation.....	103
what prevents running of statute.....	105
where defendant dies without the State.....	105
between death, and granting of letters.....	105
where plaintiff dies before expiration of time.....	106
against executors or administrators.....	107
effect of non-suit granted.....	108
effect of an injunction on time limited.....	108
reversal of judgment, when extends time of.....	108
when extended, by submission to arbitration.....	109
discontinuance, effect of, where counterclaim pleaded.....	109
what actions not within the statute.....	110
computation of time under statute.....	111
in action on open account.....	111
by principal against agent for negligent act.....	111
where demand necessary.....	112
against trustee for detention of property.....	112
on deposits	112
on demand notes	112
on checks	112
by trustee against <i>cestui que trust</i>	113
by surety or endorser.....	113
by attorney for services	113
by factor	113
for false imprisonment	114
in conversion	113
for tort	114
against director for failure to report.....	114
cause of action barred, not a defense or counterclaim.....	114
acknowledgment, or new promise to prevent running of the statute, must be in writing	114
what is sufficient to prevent running of statute.....	114
by whom acknowledgment may be made.....	115
how statute must be pleaded to be available.....	117
when general statute does not apply.....	118

LIMITATION OF ACTION—(<i>Continued</i>):		PAGE
when action deemed begun.....		118
attempt to commence action, effect of.....		119
LIS PENDENS. <i>See</i> NOTICE OF PENDENCY.		
LOAN COMMISSIONERS:		
action against, how brought.....		156
LUNATICS:		
how summons served upon.....		198
when court may appoint guardian <i>ad litem</i> for.....		199
receiver in action by or against.....		709
M.		
MANDATE:		
sheriff must receipt for.....		23
amendment of		781
MARRIAGE:		
limitation of action to annul.....		96
of woman, does not abate action.....		812
MARRIED WOMAN:		
statute of limitations runs against.....		112
MERITS, AFFIDAVIT OF. <i>See</i> AFFIDAVIT OF MERITS.		
MISTAKE:		
of officer of court, how corrected.....		18
of court, party not to suffer by.....		770
relief against, when		796
must be applied for within one year.....		796
notice required to set time running.....		796
power of court to relieve against, not given by statute.....		797
what will be relieved against.....		797
relief against, discretionary		797
relief will be denied for laches.....		798
MORTGAGE:		
when leave to sue upon necessary.....		124
who must be plaintiffs in action to foreclose.....		175
who must be defendants in action to foreclose.....		176
person liable for deficiency may be joined as defendant.....		177
when notice of pendency must be filed in action of.....		237
MOTIONS:		
defined		245
contested cannot be heard in chambers.....		9
when made out of court in first district.....		78
not a remedy		245
ex parte and contested.....		245
enumerated, defined		245
non-enumerated, defined		246
where made		246
before a judge out of court.....		246
in first district		249

MOTIONS—(*Continued*):

	PAGE
when may be heard by another judge.....	250
must be made at special term, exceptions.....	248
contested cannot be made at chambers.....	249
in seventh judicial district.....	249
for irregularity, when made.....	246
to set aside judgment, when made.....	246
to change place of trial, when made.....	247
for settlement of issues, when made.....	247
to correct pleadings, when made.....	247
requisites of papers, on.....	50
when defects in waived.....	250
copies of papers must be served with notice of.....	251
when copies need not be served.....	251
only papers served, or referred to in notice to be read, on.....	251
how new facts presented by moving party on.....	251
<i>See, also, AFFIDAVIT.</i>	
<i>See, also, PETITION.</i>	
opposing affidavits on	263
<i>See, also, NOTICE OF MOTION.</i>	
costs on, must be asked if desired.....	264
<i>See, also, ORDER TO SHOW CAUSE.</i>	
<i>See, also, STAY OF PROCEEDINGS.</i>	
when notice of, may be countermanded.....	268
hearing, order of	269
objections how taken on.....	269
new proof, how may be presented.....	269
new proof, when allowed.....	269
reference, when ordered upon hearing of.....	269
mode of examination of witness on.....	270
adverse party not to be examined.....	270
default, how taken on.....	270
what relief may be granted on default.....	270
when default will be opened.....	271
contested motion can only be renewed by leave of court.....	271
when leave will be granted.....	271
how motion made	272
practice on motion to renew.....	272
renewal of <i>ex parte</i> motion	272
to whom application for to be made.....	272
when order for must be vacated.....	272
renewal without leave, contempt.....	273
re-argument, application for.....	273
conditions may be imposed, upon granting discretionary.....	279
acceptance of	279
when must be performed	279
how performed	280

MOTIONS—(<i>Continued</i>):	PAGE
costs of	280
discretionary	281
amount of	281
when proceedings stayed, for non payment of.....	281
waiver of such stay.....	282
when stay may be insisted on in First Department.....	282
costs of, when taxed in costs of action.....	282
for interpleader, <i>see</i> INTERPLEADER.	
to make pleading definite and certain.....	388
to vacate or modify order of arrest.....	515
<i>See, also, ARREST AND BAIL.</i>	
to vacate or modify injunction.....	606
<i>See, also, INJUNCTION.</i>	
to vacate attachment for irregularity.....	676
<i>See, also, ATTACHMENT.</i>	
for appointment of receiver, <i>see</i> RECEIVER.	
for provisional remedy, to be decided within twenty days.....	752
for amendment	794
to vacate for irregularity, should be made promptly.....	801
for substitution of parties, <i>see</i> CONTINUANCE OF ACTION.	
cannot be decided after death of party.....	831
for discovery, <i>see</i> DISCOVERY OF BOOKS AND PAPERS.	
MUNICIPAL CORPORATION:	
people may be plaintiff in action for conversion of funds of....	154
people may be plaintiff in action to restrain.....	155
taxpayers may sue to prevent waste of property of.....	157
how summons served upon.....	205
N.	
NE EXEAT:	
writ of, abolished	483, 496
NEGLIGENCE:	
action for, when barred.....	98, 101
after death by, when barred.....	99
NEGOTIABLE PAPER:	
pleading upon	329
NON-RESIDENT:	
action against, when barred.....	103
may obtain leave to sue as poor person.....	135
how served by publication.....	219
attachment against	618
judgment against, on service by publication, against what prop- erty enforced	693
NOTARY:	
certificate of protest of, when presumptive evidence.....	336

NOTICE:	PAGE
application for guardian <i>ad litem</i>	183
of no personal claim, when may be served with summons.....	197
of service by publication, to be published with summons.....	225
publication of, with summons, in matrimonial actions.....	226
in action of partition.....	226
of application for deposition.....	261
when must be in writing.....	283
to produce, when may be by parole.....	283
of entry of judgment, when does not limit time to appeal.....	283
publication of, <i>see</i> PUBLICATION.	
when required in application for injunction.....	584
of application for discharge of property from attachment.....	684
of application for receiver of corporation, to whom given.....	735
to creditors, by receiver of corporation.....	740
of appeal, when amendment of.....	777, 791
NOTICE OF MOTION:	
cannot be served on Sunday.....	5
must be for the first day of term, exceptions.....	263
form and contents of.....	264
must be accompanied with copies of papers.....	264
for irregularity, form of.....	264, 803
relief, how stated in.....	264
costs must be asked for, if desired.....	264
service of	264
when may be countermanded.....	268
for judgment on account of frivolous pleading.....	380
when must be given in vacating injunction.....	606
NOTICE OF PENDENCY:	
when may be filed.....	237
in action of foreclosure, when must be filed.....	237
when notice becomes operative.....	238
in what actions may be filed.....	238
in action of ejectment.....	239
where warrant of attachment has been issued.....	239
contents of	240
in foreclosure cases	240
description of lands in.....	240
recording of	240
when may be filed by defendant.....	240
effect of	241
in action of foreclosure	241
in action for determination of claim to real property.....	241
how far commencement of action.....	241
amendment of	242
when new notice required after amendment.....	243
when notice may be cancelled.....	243

NOTICE OF PENDENCY—(<i>Continued</i>):	PAGE
upon warrant of attachment.....	651
cancellation of, after attachment vacated.....	696
NOTICE OF TRIAL:	
may be given for adjourned term.....	11
NUISANCE:	
parties to action for a.....	180
when will be restrained	564

O.

OATH. *See* AFFIDAVIT.

OCCUPATION:

of real property under written instrument.....	85
when deemed adverse	85
of real property, not founded on written instrument.....	87
what included in	87
when deemed adverse	87

OFFER OF JUDGMENT. *See* COMPROMISE.

OFFER TO LIQUIDATE. *See* DAMAGES.

OFFICER:

limitation of action against.....	97, 100
continuance of action by or against.....	824

OFFICIAL ACTS:

when will be restrained.....	567
------------------------------	-----

OFFICIAL BONDS:

leave to sue on	125
of public officers generally.....	125
who are such officers	127
where action brought	127
when notice of application required.....	127
when people may sue upon	155
<i>See, also, NAME OF OFFICER, under its title.</i>	

OMISSIONS. *See* MISTAKES.

ORDER:

defined	245, 274
when made out of court, in first district.....	77
what judge may make, out of court.....	77
how such order vacated	77
for substituted service of summons, contents of.....	216
must be filed, within ten days.....	217
for publication of summons, by whom made.....	223
must be made by judge.....	223
what must contain.....	223
by whom made	274
by whom should be drawn.....	274

ORDER—(*Continued*):

	PAGE
when should be submitted to the court.....	274
how settled	275
remedy, where order does not comply with decision.....	275
form of	275
all papers used on motion should be recited in.....	275
how reference made to petition on which granted.....	276
when preliminary objections should appear.....	276
grounds of, when proper to be stated.....	276
how signed, or certified.....	276
entry of	277
how to be entered.....	277
by whom entered	277
penalty for failure to enter.....	277
<i>ex parte</i> , need not be entered.....	277
when <i>ex parte</i> may be entered.....	278
when judge may require to be entered.....	278
papers used on, must be filed.....	278
when it takes effect.....	278
when decision deemed made.....	278
effect on stay of proceedings.....	279
must be obeyed, though erroneous.....	279
copy of, when must be served.....	279
how service should be made.....	279
effect of conditions in.....	279
modification of.....	280
costs in	281
<i>ex parte</i> , how vacated.....	280
one judge cannot vacate order made by another.....	280
of interpleader	313
for bill of particulars, form of.....	357
for amendment of pleading, what should provide.....	368
for arrest, by whom granted.....	511
when may be granted	512
contents of order	514
<i>See</i> , also, ARREST AND BAIL.	
for injunction, what should recite.....	587
remedy for irregularity in.....	801
for discovery, <i>see</i> DISCOVERY OF BOOKS AND PAPERS.	

ORDER TO SHOW CAUSE:

what judge may make	78
when county judge cannot make.....	78
when proper	265
in what cases will be made.....	265
what must be stated to obtain.....	265
is discretionary	265
requirements of the order.....	265

ORDER TO SHOW CAUSE—(<i>Continued</i>):	PAGE
by whom made	266
how served	266
why proceedings should not be stayed.....	267
for appointment of receiver, <i>see</i> RECEIVER.	
amendment of	791
OVERSEERS OF THE POOR:	
when may sue or be sued.....	156

P.

PAPERS:

filing of, <i>see</i> FILING OF PAPERS.	
service of, <i>see</i> SERVICE.	
on motion, requisites of.....	250
when defects in, waived.....	250
on which order granted, must be filed.....	278
how to be endorsed and subscribed.....	283
must be folioed	284
to be legibly written	284
when order for filing will be granted.....	290
in arrest and bail.....	496, 505
must be filed.....	524
on which injunction granted.....	585
<i>See, also, INJUNCTION.</i>	
upon granting attachment	630
<i>See, also, ATTACHMENT.</i>	
discovery of, <i>see</i> DISCOVERY OF BOOKS AND PAPERS.	

PARTIES:

guardians <i>ad litem</i> not.....	12
in partition when served with pleadings.....	12
who are	139
who may be joined as plaintiffs.....	139
who may be defendants	139
where one will not consent to join as plaintiff.....	140
where party in interest must sue as plaintiff.....	140
who are necessary	141
same person cannot be plaintiff and defendant.....	147
in action by agent or principal.....	143
by assignees	144
by or against an incorporated association.....	145
by or against corporations, directors or stockholders.....	147
by or against executors or administrators.....	149
in action against corporations	147
in action by or against directors or stockholders.....	148
against officers or agents of corporations, for malfeasance..	148
in action against directors of corporation.....	148
in action against stockholders of corporation.....	149

PARTIES—(Continued):	PAGE
in action against public officers	133
when people may sue, <i>see</i> PEOPLE.	
in action against town officers.....	155
in action by or against county officers.....	155
in action by or against town.....	156
in action to prevent waste of property of municipal corporation	157
in action to vacate audit of accounts.....	157
trustees of an express trust	157
when beneficiaries may sue.....	158
where one may sue or be sued for all.....	140, 159
what pleading in such case must show.....	159
who may share in proceeds of judgment.....	160
plaintiff controls action	161
other creditors may come in after judgment.....	161
when other parties cannot come in.....	161
united in interest must be joined.....	140, 161
tenants in common when may be joined.....	162, 164
when may sue severally.....	162, 164
defendants jointly and severally liable.....	161, 164
defendant in action on written instrument.....	162, 164
who may be joined as defendants in action for tort.....	163
in ejectment, who may be plaintiffs.....	166
who must be defendants.....	168
when person claiming title may be joined as.....	169
who may be plaintiffs in partition.....	170
when partition may be brought by infant.....	170
who should be joined as defendants in partition.....	172
when creditor may be defendant in such action.....	174
who must be defendant in action for dower.....	174
in action to foreclose mortgage.....	175
in action to compel determination of claim to real property	178
in action for waste.....	179
in action for a nuisance.....	180
when the defendant or his name is unknown.....	180
infant plaintiffs and defendants	182
<i>See, also, INFANT.</i>	
guardian <i>ad litem</i> , <i>see</i> INFANT.	
service of papers on, how made.....	286
when privileged from arrest.....	503
may take advantage of irregularity.....	800
substitution upon death of, <i>see</i> CONTINUANCE OF ACTION.	
substitution, on transfer of interest of.....	821
rules for substitution of in ejectment.....	825
in partition	826
where cross action may be ordered on motion to bring in new...	829

PARTITION:	PAGE
by infant, leave to sue, in action of.....	133
when people, proper parties defendant.....	155
who may be plaintiffs in.....	170
when may be brought by infant.....	170
who should be joined as defendants in.....	172
when creditor may be joined as.....	174
how unknown defendant served in.....	174
guardian <i>ad litem</i> for infant in.....	184
<i>See, also, INFANT.</i>	
effect of filing notice of pendency of action in.....	241
receiver in	707
when grantee of defendant may be substituted in action of....	822
rules for substitution of parties in.....	826
PAYMENT:	
prevents running of statute of limitations	90
presumption of, how pleaded.....	91
PAYMENT INTO COURT:	
when may be ordered	754
effect of	754
of money upon tender.....	755, 756
how made	758
when no tender has been made.....	760
order for, required	760
costs after	760
what admitted by	761
how money to be kept.....	762
application for payment out of court.....	762
order to be countersigned.....	763
PENALTY OR FORFEITURE:	
action for, when barred	97, 99
when people to be plaintiff in action for.....	152
when summons to contain reference to statute in action for...	195
what reference sufficient	196
how such reference waived	196
PENDENCY OF ACTION. <i>See</i> NOTICE OF PENDENCY.	
PEOPLE:	
limitation of action by.....	82, 102
what adverse possession bars.....	82
claims against, when barred.....	103
to be plaintiff, in action to suspend officer of corporation.....	152
to compel officer of corporation to account.....	152
to dissolve corporation	153
to annul corporation	153
of <i>quo warranto</i>	154
for embezzlement, or conversion of property of municipal corporation	154

PEOPLE—(Continued):	PAGE
to enforce penalty of forfeiture	154
to enforce escheat.....	154
to enforce forfeiture for treason.....	154
in State writ	154
upon undertaking, in proceedings for contempt.....	154
to establish charitable trust.....	155
to restrain municipal corporation.....	155
upon official bonds	155
to recover draft remitted for taxes.....	155
when may be party defendant.....	155
in partition action	155
when proper plaintiffs in action for nuisance.....	180
no counterclaim allowed in action by.....	453
PETITION:	
when motion may be made on.....	260
requisites of	260
amendment of	792
PLACE:	
how pleaded	325
PLACE OF TRIAL:	
when motion made to change.....	245
stay of proceedings on motion to change.....	268
PLAINTIFF:	
who may be joined as.....	139
one who will not join as, to be made defendant.....	140
real party in interest must sue, as.....	140
who may be joined as.....	141
agent must sue in name of principal.....	143
when agent may sue in his own name.....	143
assignee, when proper plaintiff.....	144
joint stock association, president or treasurer may sue as.....	146
when stockholders of corporation may join as.....	147
when executor or administrator may be.....	150
when people may be plaintiff, <i>see</i> PEOPLE.	
<i>See, also, TRUSTEE OF EXPRESS TRUST.</i>	
when beneficiaries may sue.....	140, 157
where one may sue or be sued for all.....	159
<i>See, also, PARTIES.</i>	
persons jointly interested, must be joined as.....	161
in ejectment, who may be	166
who may be, in partition	172
in foreclosure, who may be	175
in action to compel determination of claim to real property....	178
in action for waste	179
in action for nuisance	180
when private person may be in such action.....	180

PLAINTIFF—(<i>Continued</i>):	PAGE
when may sue to collect attached property.....	662
when may join with sheriff in suit brought to collect attached property	663
judgment for, when part of claim admitted by answer.....	764
<i>See, also, SATISFACTION.</i>	
when may make offer of compromise.....	772
death of. <i>See CONTINUANCE OF ACTION.</i>	
discovery by. <i>See DISCOVERY OF BOOKS AND PAPERS.</i>	
PLEADING:	
presumption of payment, how pleaded.....	91
motion to correct, when made	245
when and where filed.....	290
forms of, abolished	318
facts only to be stated	320
how facts to be stated	320, 323
hypothetical pleading, when held good.....	321
legal conclusions not to be stated in.....	321
facts which must be proved, must be pleaded.....	322
facts necessary to show right to relief, should be stated in....	322
what facts need not be pleaded.....	322
what certainty required in stating facts in.....	324
time, how stated in.....	324
place, how stated in.....	325
facts should be positively stated in.....	325
when may be stated on information and belief in.....	326
construction of allegation upon information and belief in....	326
how to allege private statute in.....	326
account	326, 351
judgment	327
conditions precedent	328
instrument for payment of money only.....	329
slander and libel	330
how to be written and endorsed.....	331
separate statement of cause of action or defense in.....	331
form of such statement	331
remedy for failure to state separately.....	332
each count to be complete in itself.....	332
same cause of action or defense not to be pleaded in different counts	332
subscription of	333
service of	333
service of answer on co-defendant.....	334
issue determined by copy of, served.....	334
verification of, <i>see VERIFICATION.</i>	
allegations of, to be liberally construed.....	346
rule requiring liberal construction of, how applied.....	346

PLEADING—(*Continued*):

PAGE

what will be assumed in construction of.....	347
construction of, upon demurrer.....	347
construction of, more liberal on trial than on demurrer.....	347
clerical errors, when disregarded in.....	348
when construed most strongly against pleader.....	348
where prayer for relief may be consulted in construction of...	349
what deemed admitted in construction of.....	349
facts admitted by, cannot be contradicted.....	350
amendments of, <i>see</i> AMENDMENT.	
supplemental, <i>see</i> SUPPLEMENTAL PLEADING.	
application for judgment on account of frivolousness of.....	379
on what pleading such judgment may be granted.....	379
when granted	380
when not granted	380
what relief must be asked in notice of motion for.....	380
when leave to amend will be granted on motion for.....	381
order granting, appealable	381
sham pleading, <i>see</i> ANSWER.	
irrelevant, redundant or scandalous matter may be stricken out	385
motion for, when to be made.....	387
waiver of right	387
what is irrelevant matter in.....	385
what is redundancy in	386
granting of motion to strike out, discretionary.....	386
what is scandalous matter in.....	386
will not be permitted to remain on record.....	386
attorney will be charged with costs on motion to expunge..	386
when made definite and certain.....	388
when motion for will be denied.....	389
when discovery granted to enable party to frame.....	388
<i>See, also, DISCOVERY OF BOOKS AND PAPERS—COM-</i>	
<i>PLAINT—ANSWER—COUNTERCLAIM—REPLY—DE-</i>	
<i>MURRER.</i>	

POOR PERSON:

leave to sue as	134
application how made.....	134
when application may be granted.....	135
who may apply	135
person admitted to sue as, need not pay fees.....	136
when order granting leave may be annulled.....	136
when party may defend as poor person.....	137
leave to sue as, does not authorize appeal by.....	137
when costs granted to, must be paid to attorney.....	138

PRACTICE:

where rules of found	1
where no statute or rule.....	2

PRIVILEGE FROM ARREST. <i>See</i> ARREST AND BAIL.	PAGE
PROCEEDINGS:	
when according to practice of chancery.....	2
to punish attorney, a summary proceeding.....	30
procedure upon	30
upon death or disability of attorney.....	37
stay of, by whom granted	266
stay of, for non-payment of costs of motion.....	281
when void for irregularity	800
how irregularity in, corrected.....	801
PROCESS:	
cannot be issued on Sunday	4
made returnable on Sunday, not void.....	5
sheriff cannot execute in his own favor.....	23
service, and return of by sheriff.....	20
only to be amended by the court.....	794
PROOF OF SERVICE:	
of summons. <i>See</i> SUMMONS.	
of process, or papers other than summons.....	289
PROTEST:	
notary's certificate of notice, when presumptive evidence.....	336
PROVISIONAL REMEDIES:	
court acquires jurisdiction from time of granting.....	189
when party may be required to elect between.....	752
motion for to be decided within twenty days.....	752
right of defendant to, on counterclaim.....	753
<i>See</i> ARREST AND BAIL—ATTACHMENT—INJUNCTION—	
RECEIVER.	
PUBLICATION:	
of summons how made.....	227
of summons, when complete.....	227
of notice, time of, how computed.....	292
in what papers notice to be published.....	317
of notice for creditors to exhibit demands, in action for their	
benefit	317
of notice, where no newspaper in county.....	317
Q.	
QUO WARRANTO:	
people, plaintiffs in.....	153
when injunction granted in action of.....	506
R.	
REAL ESTATE:	
limitation of action by people for.....	82
limitation of action by other than people for.....	83

REAL ESTATE—(*Continued*):

PAGE

parties in action to compel determination of claim to.....	178
when notice of pendency filed in action concerning.....	237
undertaking in injunction relating to.....	598

RE-ARGUMENT:

of motion	273
-----------------	-----

RECEIVER:

leave to sue in action by or against.....	130
counterclaim in action by.....	451
purpose of appointment of.....	697
duty of	697
who may be appointed.....	698
who should not be appointed.....	698
practice where appointed in more than one action.....	699
rights of second receiver, when more than one.....	700
what must be shown upon application for appointment of...	710
application must be upon notice.....	710
by whom appointed	701
order appointing, how far appealable.....	702
reference to appoint	702
court may make order of reference.....	702
not usually appointed until after summons served.....	702
consent, waiver of irregularities in appointment.....	702
when appointed before final judgment.....	703
courts still have same power to appoint as before code.....	703
not appointed where remedy at law adequate.....	704
what must appear to authorize appointment of.....	704
in action to foreclose mechanic's lien.....	705
in action between partners	705
in creditor's action	705
in what cases appointed	706
in action for partition	707
in action to foreclose mortgage.....	707
in action on fraud of executor or administrator.....	709
in action against trustee.....	709
in action by or against incompetent person.....	709
when appointed by or after final judgment.....	710
security to be given by	713
security by trust company.....	713
court may require new bond.....	714
what passes to receiver	714
when title to vests.....	715
powers of	717
when may employ counsel	718
may apply to court for instructions.....	718
not to be sued without leave of court.....	718
must follow directions of court.....	721

RECEIVER— <i>Continued</i>):	PAGE
duty of, when sued without leave.....	722
how far liable for costs	722
when liability ceases	723
when will be charged with interest.....	723
compensation of	724
how discharged or removed.....	725
court may remove	726
when may be substituted as defendant in action against corporation	824
when bound by judgment without substitution.....	824
<i>See, also, PROVISIONAL REMEDIES.</i>	

RECEIVER OF CORPORATION:	
can only be appointed by court.....	727
in what cases appointed	727
in proceedings for voluntary dissolution of corporation.....	729
when title vests in such case.....	730
in proceedings against banking corporation.....	730
cases in which court cannot appoint.....	732
order upon, to designate places of deposit.....	733
in action against corporations annulled by law.....	734
application for appointment, where made.....	734
notice of application, how given, and to whom.....	735
when notice must be given to attorney general.....	735
who may be appointed	736
who cannot be appointed	737
security to be given by.....	737
powers of	738
what property vests in.....	739
to make and file inventory.....	740
to publish notice to creditors.....	740
duties of, in proceedings in equity against corporation.....	741
duties of, on voluntary dissolution of corporation.....	741
of insurance company, to make assessment.....	743
to present account to the court	743
powers of, of insolvent banking corporation.....	743
court may remove	747
when attorney general may apply for removal of.....	747
where motion to be made.....	747
compensation of	749

RECORDING:	
of notice of pendency of action.....	240

REFERENCE:	
attorney may consent to	39
on contested motion	269, 270
action does not abate, after report made.....	830
report on, void, if made after death of party.....	831

RELIGIOUS CORPORATION:	PAGE
when one member of, may sue for all.....	160
RENEWAL:	
of contested motion	271
of <i>ex parte</i> motions and applications.....	272
REPLEVIN:	
when jurisdiction acquired in action of.....	190
does not abate by death.....	812
REPLY:	
defense of statute of limitation to counterclaim must be pleaded	
by	117
when plaintiff may.....	457
may be directed by the court.....	457
what defenses do not require	458
what waived by	458
what must contain	459
may contain counterclaim.....	460
judgment, on failure to.....	460
when waived by defendant.....	461
grounds of demurrer to. <i>See</i> DEMURRER.	
RESIDENT:	
may designate person to receive service during absence.....	203
how such designation revoked.....	204
RETAINER:	
of attorney, when must be in writing.....	39
authority of attorney under.....	39
RETURN:	
of deputy, conclusive upon sheriff.....	21
by sheriff upon execution of process.....	23
how compelled	23
in special proceedings, where filed.....	290, 291
amendment of	792
REVIVAL OF ACTION. <i>See</i> ABATEMENT OF ACTION.	
RULES:	
of practice where found.....	1
courts of record may make.....	2
S.	
SATISFACTION:	
of part of plaintiff's claim	764
when ordered	764
as to what causes of action.....	764
where application for to be made.....	766
what judgment entered.....	766
SATURDAY:	
noon to midnight of, to be holiday.....	6

SAVINGS BANK:	PAGE
interpleader in action against.....	312
SCHOOL DISTRICT:	
when trustee of, may sue or be sued.....	155
SEAL:	
of courts	16
SEALED INSTRUMENT:	
action on, when barred.....	92
SERVICE:	
of papers cannot be made on Sunday.....	4, 5
of process may be made on holidays other than Sunday.....	6
of process by sheriff.....	20
on sheriff, how made.....	24
upon county treasurer, how made.....	126
on unknown defendant in partition.....	174
of summons on guardian <i>ad litem</i> of absent infant defendant...	186
of summons, <i>see</i> SUMMONS.	
of process to commence special proceedings, how made.....	211
of summons, voluntary general appearance, when equivalent to.	231
notice of motion	264
order to show cause provides short time for.....	265
when and how to be made of copy of order.....	279
on whom to be made.....	285
when may be made on clerk.....	286
personal, how made, on party or attorney.....	286
by mail, how made on party or attorney.....	286
proof of, <i>see</i> PROOF OF SERVICE.	
of paper, personal, must be eight days.....	292
by mail sixteen days.....	292
time for service, how computed.....	292
when double time allowed.....	294
how completed	333
when complaint to be served.....	422
of order of injunction, and papers on which granted.....	589
SET OFF:	
what it is	439
distinguished from counterclaim.....	439
SEVERANCE:	
of action, when part of claim admitted.....	764
SHAM PLEADINGS. <i>See</i> ANSWER.	
SHERIFF:	
to open and adjourn court in absence of judge.....	11, 12
an officer of the court.....	20
powers and duties of.....	20
liable for acts of deputy.....	21, 22
when not liable for acts of deputy.....	21, 22

SHERIFF—(Continued):

	PAGE
deputy's return conclusive upon.....	21
not to practice as attorney.....	22
cannot purchase at execution sale.....	22, 23
cannot execute process in his own favor.....	23
cannot be bail.....	23
must give receipt for mandate.....	23
how process to be executed by.....	23
return of execution of process.....	24
how service made upon.....	24
when punished by court.....	24
must attend courts.....	25
relation and duties of outgoing and incoming.....	25
fees of	26
limitation of action against.....	97, 100
when leave to sue bond of, necessary.....	125
what must appear before granting leave to sue.....	125
more than one order granting leave to sue may be made.....	126
how summons served upon.....	100
certificate of service of summons by.....	211
what certificate must show.....	211
liability of, in arrest and bail on failure of sureties to justify..	529
rights and liabilities as to bail, <i>see</i> ARREST AND BAIL.	
must execute warrant of attachment.....	644
may require indemnity on executing such warrant.....	645
<i>See, also, ATTACHMENT.</i>	
responsibility for sufficiency of sureties in undertaking to dis-	
charge attachment	689
must regain possession of personal property after attachment..	693
after judgment, may collect whatever attached.....	693
when may sell property attached after levy.....	693
to whom property given after warrant of attachment vacated...	694
to deliver books, etc., to defendant after attachment vacated...	695
to file return after attachment vacated.....	696
amendment of certificates and deeds of.....	792

SLANDER:

rule for pleading in.....	330
---------------------------	-----

SPECIAL PROCEEDINGS:

attorney's lien in.....	46
statute of limitations applies to.....	118
service of process to commence, how made.....	211
papers in, where filed.....	291

SPECIAL TERM. *See* SUPREME COURT.

SPECIFIC PERFORMANCE:

action for, when barred.....	92
------------------------------	----

STATE:

when proper party defendant.....	155
----------------------------------	-----

STATE PRISON:	PAGE
superintendent of, how named in action.....	156
STATE WRIT:	
in whose name to be issued.....	154
STATUTE:	
where no provision made by, what practice controls.....	2
private, how alleged in pleading.....	326
STATUTE OF LIMITATIONS. <i>See</i> LIMITATION OF ACTION.	
STATUTE LIABILITY:	
when barred in six years.....	93
STAY OF PROCEEDINGS:	
by whom granted.....	266
judge out of court can only grant for twenty days.....	267
practice, when longer stay required.....	267
when granted on motion to change place of trial.....	268
effect of	268
when deemed vacated on decision.....	279
for non-payment of costs of motion.....	281
offer of compromise, operates as.....	771
STIPULATION:	
when must be in writing.....	284
STOCKHOLDER:	
when one may sue for all.....	160
SUBSTITUTION:	
of attorney, how made.....	44
SUMMARY PROCEEDINGS:	
to fix attorney's compensation.....	50
when restrained by injunction.....	563
SUMMONS:	
how issued in name of infant.....	182
how served on unknown defendant in partition.....	174
when may be served on guardian <i>ad litem</i> of infant defendant..	186
action commenced by service of.....	189
contents of	190
how names of parties may be stated in.....	191
how party designated, when name unknown.....	181
place of trial, how stated in.....	192
subscription of, what sufficient.....	192
form of	192
how amended	192
complaint may be served with.....	193
notice when copy of complaint not served with.....	193
how and when amended.....	193
when must contain reference to statute on which suit brought..	195
what reference sufficient, in action for penalty.....	196
how such reference waived.....	196

SUMMONS—(*Continued*):

	PAGE
notice of, no personal claim with.....	197
by whom personal service may be made.....	197
service on natural person, how made.....	198, 200
upon infant defendant, how made.....	199
upon idiot or habitual drunkard, how made.....	199
when court may designate person to be served.....	199
how served upon sheriff.....	199
personal service, how must be made within the State.....	200
when service of, will be vacated.....	200
who privileged from personal service.....	201
on what days cannot be served.....	203
designation of person on whom service may be made.....	204
how designation revoked	204
service of, on domestic corporation.....	205
remedy for irregular service on corporation.....	206
service of, on foreign corporation.....	207
personal service, proof of, how made.....	211
when may be proved by admission.....	211
affidavit of service, what must appear in.....	212
genuineness of admission must be proven.....	213
what admission must show.....	213
substituted service, when it may be made.....	214
affidavit for what must show.....	215
order for substituted service, contents of.....	216
order must be filed within ten days.....	217
when service complete	217
service of by publication, in what cases made.....	217
when made on person other than defendant.....	218
when may be made upon resident.....	217
application for, what must appear in.....	219
order for publication of, by whom made.....	223
must be made by judge.....	223
what order must contain.....	223
service by publication, how made.....	224
notice to be published with summons.....	225
notice in action of partition to be published with.....	226
in matrimonial actions to be published with.....	226
papers must be filed.....	225
publication of, how made.....	227
when complete	227
service under order of publication.....	227
mailing, when may be dispensed with under such order.....	225
proof of service by publication how made.....	228
when defendant allowed to defend after service by publication..	228
service without the State.....	227
when voluntary general appearance, equivalent to personal service of	231

SUMMONS—(<i>Continued</i>):	PAGE
when and where filed.....	290
when complaint dismissed for failure to serve.....	314
not amendable of course.....	361
how may be amended.....	779
when court may order supplemental, on substitution of party	827
SUNDAY:	
courts shall not be open on.....	4
extends from midnight to midnight.....	5
process cannot issue or be served on.....	5
process returnable on, not void.....	5
judgment entered on, void.....	5
<i>habeas corpus</i> may be issued and served on.....	5
award cannot be made on.....	5
notice of motion cannot be served on.....	5
injunction may be issued and served on.....	4
verdict may be received on.....	4, 5
no instructions to be given to jury on.....	6
holidays and half-holidays to be considered as.....	6
SUPERINTENDENT OF THE POOR:	
when may sue or be sued.....	155
SUPERSEDEAS:	
after order of arrest.....	521
SUPERVISOR:	
when may sue or be sued.....	155
SUPPLEMENTAL PLEADING:	
when court may allow.....	372
application for must be on notice.....	373
allowance of discretionary.....	373
on application for, court will not pass on pleading.....	373
object of supplemental pleading.....	374
what may be set up by.....	374
may be in addition to original pleading.....	376
terms of allowance, in discretion of the court.....	376
what terms may be imposed.....	372
when demurrer may be interposed to.....	465
when may be ordered on substitution of parties.....	827
SUPPLEMENTARY PROCEEDINGS:	
application of leave to sue by receiver in.....	130
special requirements of affidavit in.....	256
stayed by non-payment of costs.....	282
papers in, filed when and where.....	291
SUPREME COURT:	
appellate division.	
convention of justices of, to make general rules.....	2

SUPREME COURT—(<i>Continued</i>):	PAGE
in each department may make rules.....	2
terms of	7
to designate times and places of special and trial terms..	7
to assign justices to hold special and trial terms.....	7
may designate justice of same department to prevent term failing	9
no judge of, to sit in review of his own decision.....	15
clerk of, how appointed and where to have office.....	16
seal of	16
duties of clerks of.....	17
power of, over attorneys and counsellors.....	35
appeals from, to Court of Appeals.....	62
appointments of	64
how constituted	64
powers of justices of.....	64
powers of	65
may hear any motion that a special term may entertain..	248
appointment of terms	7, 8
terms of, must be held at times and places appointed.....	8
term held by justice of another department, duly designated, valid	8
extraordinary terms	8
special terms.	
to be held at times and places designated by appellate division	7
designations valid though after time named in statute....	8
one to be held in each county each year.....	8
place of holding to be that designated for county court....	9
may be adjourned to chambers.....	9
motion to be made in, and where.....	248
held same time and place with trial term.....	249
order to show cause, when returnable at.....	265
trial terms.	
jurisdiction of circuit courts vested in.....	3, 4
times and places of, designated by appellate division.....	7
designations valid though after time named in statute....	8
two to be held in each county each year.....	8
two or more held at same time in any county.....	8
may be held in two or more parts.....	8
place of holding to be that designated for county court....	9
may be adjourned to chambers.....	9
county clerk is clerk of.....	16
power to suspend or remove attorneys.....	30
original creation of.....	63
how now constituted.....	63
appellate divisions, how constituted.....	64

SUPREME COURT—(<i>Continued</i>):	PAGE
powers of justices of.....	65
has all the jurisdiction of certain abolished courts.....	3
has general jurisdiction in law and equity.....	65
given by the constitution.....	65
extent of	66
in equity, what it includes.....	66
in special cases	66
when it may remove to itself, actions from other courts.....	67
for what equity business, it is always open.....	67
justices of, what they may do out of court.....	77
SURROGATE'S COURT:	
limitation of action on judgments of.....	91
SURROGATE:	
when disqualified	13
not to practice as attorney in certain counties.....	15
not disqualified by age	16
clerk of, how appointed.....	16
leave to sue official bond of.....	126
leave of, for infant to bring action of partition.....	133
T.	
TAXES:	
assessment of, will not be restrained by injunction.....	572
TAXPAYER:	
may sue to prevent waste.....	156
when injunction will be granted in action by.....	567
TENDER:	
in what cases may be made.....	754
how to be made	755
kind of money in which made.....	755, 756
offer of money, when waived.....	756
to whom made	756
money must be paid into court.....	756
effect of	758
as admission of right of plaintiff to amount.....	758
as to costs	759
when to be deducted from recovery.....	759
TIME:	
of limitation of action accrued between death and granting of letters	105
how computed where plaintiff dies before expiration of limitation	106
when reversal of judgment extends, to bring action.....	108
to bring action, when extended by stay of proceedings.....	108
when extended by submission to arbitration.....	109

TIME— (<i>Continued</i>):	PAGE
how computed under statute of limitations.....	111
<i>See, also, LIMITATION OF ACTION.</i>	
within which infant defendant may answer.....	235
for doing any act, how computed.....	292
extension, <i>see</i> EXTENSION OF TIME.	
how alleged in pleadings.....	324
within which motion for provisional remedy to be decided....	752
when offer of compromise to be accepted.....	769
to apply for relief against mistakes.....	796
for motion to vacate judgment for irregularity.....	802
TITLE:	
to real property, presumption as to.....	85
TORT:	
arrest in action for, <i>see</i> ARREST AND BAIL.	
when restrained by injunction.....	577
TOWN:	
actions by, when brought in name of.....	156
TOWN OFFICERS:	
when may sue or be sued.....	155
TRADEMARKS:	
when violation of, will be restrained.....	573
TREASON:	
who plaintiffs in action upon forfeiture for.....	154
TRESPASS:	
when restrained by injunction.....	576
TRIAL:	
when of one action, stayed to abide event of another.....	307
after substitution, objection that action does not survive may	
be taken at	818
action does not abate after decision or verdict.....	829
decision upon, void, if made after death of party.....	831
when discovery granted to enable party to prepare for.....	840
<i>See, also, DISCOVERY OF BOOKS AND PAPERS.</i>	
TRIAL FEE:	
when payable	19
TRIAL TERM. <i>See</i> SUPREME COURT.	
TRUSTEE:	
action against for debt of corporation, when barred.....	100
counterclaim, in action by or against.....	451
receiver in action against	709
TRUSTEE OF EXPRESS TRUST:	
when may sue as plaintiff.....	157
who is	158
assignees for creditor.....	158

TRUSTEE OF EXPRESS TRUST—(<i>Continued</i>):	PAGE
assignee of life insurance policy.....	153
commission merchants	158
general agent of incorporated association.....	158
trustees in subscription paper.....	158
general guardian of infant.....	159
other cases	159

U.

UNDERTAKING:

attorney shall not be surety upon.....	37, 298
in contempt proceedings, in whose name brought.....	154
requisites of	297, 299
substantial compliance with statute sufficient.....	303
when one surety sufficient	297
by fidelity or surety company, when permitted.....	298
when will be approved	298
approval of bond discretionary	299
justification of sureties on, how made.....	299
what proof sufficient on.....	299
where penalty is over five thousand dollars.....	302
court must require proof.....	301
court may appoint referee to take.....	301
must be approved	302
must be filed	291, 303
defective, may be amended.....	303
action on, by whom and when brought.....	304
on arrest and bail.....	509
on injunction to stay proceedings in action.....	594
to stay proceedings upon judgment.....	594
to stay proceedings in ejectment or dower.....	595
on attachment must be given.....	640
on motion to discharge property from attachment.....	685
on attachment, when delivery of property to defendant.....	695
by receiver of corporation.....	737
amendment of	788

UNKNOWN DEFENDANT. *See* DEFENDANT.

USURY:

to recover back, when action barred.....	100
--	-----

V.

VARIANCE:

what is material.....	370
-----------------------	-----

VERDICT:

may be received on Sunday.....	4, 5
reversed where received by a judge not sitting.....	14
appellate division judge cannot receive.....	64

VERDICT—(Continued):	PAGE
amendment of	793
what defects cured by.....	805
action does not abate after.....	829
void if taken after death of party.....	831

VERIFICATION:

of pleading	335
when required	335
what is subsequent pleading, so as to require.....	335
dilatory defense must have.....	336
not sufficient affidavit to overthrow notary's certificate.....	336
when necessary to require party to prove existence of corpora- tion	336
in answer, may refer exclusively to counterclaim.....	337
when may be omitted.....	337
defendant charged with fraud, when not excused from verify- ing pleading	337
question of right to serve pleading without, how determined...	338
by whom to be made	339
how made by domestic corporation.....	339
in action where people are party.....	340
in action where public officer is party.....	340
when may be made by agent or attorney.....	340
when so made, omission to state reasons, fatal.....	344
in action on instrument for payment of money only.....	341
form of	342
remedy for defective	345

VESSEL:

attachment against, *see* ATTACHMENT.

VOID:

when proceedings are, for irregularity.....	800
---	-----

W.

WAIVER:

of invalidity of process issued on Sunday, when made.....	5
what waived by general appearance.....	233
of defects in motion papers.....	250
of stay, for non-payment of motion costs.....	281
right to amend, how waived.....	362
of privilege from arrest.....	504
of irregularity	804
none, without knowledge of facts.....	805
when intention of, will be inferred.....	805

WASTE:

parties to action for.....	179
when restrained by injunction.....	577

WATER RIGHTS:	PAGE
when interference with, restrained.....	579
WILL:	
action to establish, when barred.....	93
WITNESS:	
non-resident, privileged from service of summons.....	201
resident, not so privileged.....	202
when privileged from arrest.....	502
WRIT:	
amendment of	781

